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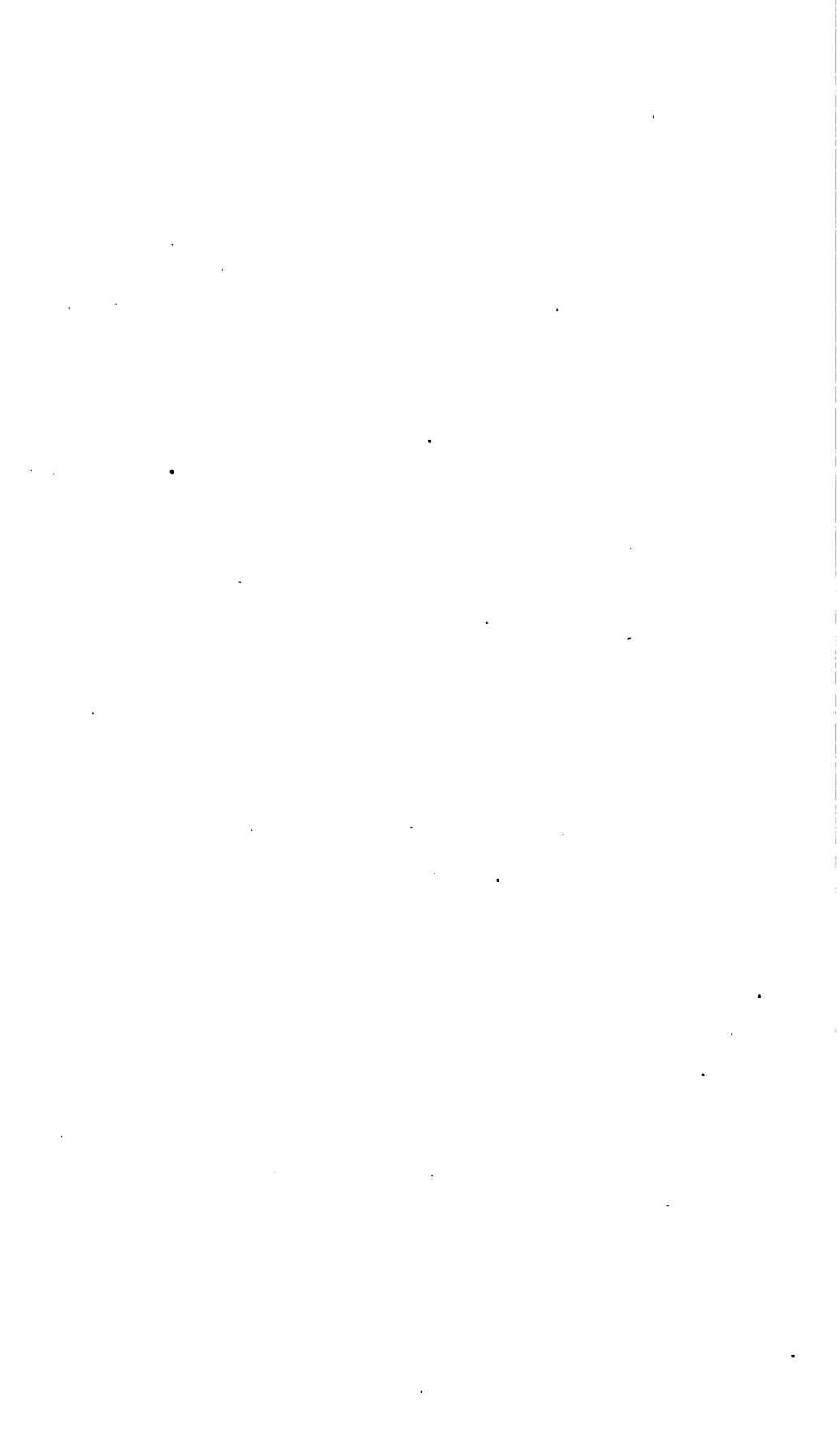
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A

**GENERAL ABRIDGMENT**

AND

**DIGEST OF AMERICAN LAW,**

WITH OCCASIONAL

**Notes and Comments.**

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BY NATHAN DANE, LL. D.

COUNSELLOR AT LAW.

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IN EIGHT VOLUMES.

**VOL. VII.**

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*District Clerk's Office.*

BE it remembered, That on the sixth day of July, A. D. 1834, and in the forty-ninth year of the Independence of the United States of America, Nathan Dane, of the said district, has deposited in this office the title of a book, the right whereof he claims as author, in the words following, to wit:

"A General Abridgment and Digest of American Law, with occasional Notes and Comments. By Nathan Dane, LL. D. Counsellor at Law. In eight volumes. Vol. vii."

In conformity to the act of the Congress of the United States, entitled, "An act for the encouragement of learning, by securing the copies of maps, charts, and books to the authors and proprietors of such copies, during the times therein mentioned;" and also to an act, entitled, "An act, supplementary to an act, entitled, An act for the encouragement of learning, by securing the copies of maps, charts, and books to the authors and proprietors of such copies, during the times therein mentioned, and extending the benefits thereof to the arts of designing, engraving, and etching, historical and other prints."

JOHN W. DAVIS,  
Clerk of the District of Massachusetts.

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# General Abridgment

OF

# AMERICAN LAW.

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## CHAPTER CCIV.

### COMPOUNDING INFORMATIONS &c.

**ART. 1. *Compounding informations.*** This is an offence against public justice ; and also has a tendency to make the laws odious to the people. It is an offence here at common law, a misdemeanor. In conducting informations on penal statutes, it is material that fair informations be not discharged ; that the laws be carried into effect with a steady hand, and with certainty, with firmness, but with moderation, and with a constant view to the public good, and never to gratify avarice, private malice, or revenge. To these ends it is important, that when such informations are commenced and set on foot, they be duly prosecuted, and not delayed, stopped, or settled, but by the consent of the court or public magistrate, and never by a compromise or compounding the offence by any agreement between the prosecutor and offender. Therefore the 18th of El. ch. 5, forbade any person, informing under a pretence of any penal law, to make any composition without leave of the court, or to take any money or promise from the deft. to excuse him, under the penalty of forfeiting £10, pillory, and forever being disabled to sue on any popular or penal statute. This statute in substance has been adopted here as common law. And this compounding is an indictable misdemeanor, punishable by fine and imprisonment. The New York act is a transcript of this statute. 9 Johns. 251. The indictment for compounding a felony states the proceedings, as that the prosecutor complained to a jus-

4 Bl. Com. 134, 135. Indictment for, 4 Wentw. 319, 332.—Cro. C. C. 252, 266.—Kem. act, Dec. 19, 1801.—1 Hale, 546. The court may fix the terms, 1 Wils. 79.—5 D. & E. 258.—4 Burr. 1929, is usual to require the king's half.

Compounding a popular action, 2 Johns. R. 405, 409.

Crowe Circuit Companion, 252, 254 to 266.

CH. 204. tice &c. of the felony in stealing &c., the issuing of his warrant, arrest, &c. the compounding with the offender: and an

Art. 2.



information against one for compounding a *qui tam* action, proceeds on the same principles,—states the grounds of the action, its commencement and prosecution, and the compounding of it. This offence in compounding informations, felonies, *qui tam* actions for penalties, and other criminal proceedings, is much oftener committed, especially in the United States, than prosecuted. This offence is attended with two no inconsiderable evils in particular: 1. This compounding holds out temptations to persons to offend, hoping by it they may escape punishment: 2. Strong temptations to unprincipled men maliciously to inform &c., hoping and meaning to make money by this kind of compromise.

See Ch. 212, a. 11, s. 26, a case in New York much examined.

ART. 2.—§ 1. *Conspiracy* is an offence also against public justice, and is a very common one. The civil action, grounded on a conspiracy, has been considered in a former chapter. And Ch. 200; Ch. 70, a. 5; Ch. 184, a. 5.

4 Bl. Com. 136.—2 Chitt. C. L. 1160.—9 Co. 66.

§ 2. *What is an indictable conspiracy.* A conspiracy in law is when two or more agree, falsely, to indict, or procure to be indicted, an innocent person of felony, or some offence falsely and maliciously, who is accordingly indicted and acquitted;—and is usually punished with fine, imprisonment, and pillory.

Poulterer's case.—Indictments &c. for. Cro. C. C. 267 to 287.—4 Wentw. 79 to 146.—6 Wentw. 375, 378.

§ 3. The rule laid down in this case was, that to make conspiracies punishable by law *before* they are executed, there must be four incidents: 1. It must be declared and shewn by some prosecution, either by making bonds or promises to each: 2. It must be malicious, as for unjust revenge &c. 3. It must be false against one innocent: and 4. It must be voluntary out of court. Conspiracy of journeymen to raise their wages.

6 Mod. 186. —Salk. 174, Rex v. Best. Same case, 6 Mod. 186. —8 Mod. 320.—Crown Cir Com. 285.—1 Haw. P. C. 190.

§ 4. So it is an indictable offence to conspire to indict one as the father of a *bastard child*. In this case the indictment alleged that the defts. intending to oppress and defame A. B., did, falsely and maliciously contrive, conspire, meet, and agree falsely to charge the said A. B. to be the father of a bastard child, of which such a woman was pregnant, and in pursuance thereof did falsely affirm him to be the father. On demurrer, held, it was not necessary to aver that A. B. was not the father. The conspiracy is the gist of the offence and indictment; and though nothing be done in prosecution of it, yet it is an offence in itself. The venue must be where the conspiracy is. And 6 Mod. 186, held, “the very agreeing together to charge a man with a crime falsely, is a consummated offence, and indictable.” And as to the want of aver-

Indictment for a conspiracy to get a bill accepted, 6 Wentw.

378, 382;—to ruin a tradesman, 439;—also a player, 448.

ment that A. B. was innocent, the law presumes every one innocent, till proved guilty. Judgment against the conspirators, for they conspired "to charge one falsely with fornication, and this, though no crime at common law, is punishable, said the court, in the spiritual courts." "And a confederacy falsely to charge with a thing that is a crime by any law, is indictable, and the confederacy is the gist of the indictment,"—by the whole court. And 3 Salk. 97.

Ch. 204.  
Art. 3.

§ 5. So in this case it seems to have been the court's opinion, that several persons may be indicted of a conspiracy in giving a man money to marry a poor woman not marriageable, with intent to give her her husband's settlement in A, if it be averred she has a legal settlement in another place, on the ground, a *legal* act done to an *illegal* end is indictable.

8 Mod. 820,  
The King v.  
Edwards &  
al.

§ 6. It is stated that where journeymen refuse to work in consequence of a combination, until their wages are raised, they may be indicted for a conspiracy.

4 Bl. Com.  
Chris. Notes,  
11.

§ 7. So the court held in this case, that it is an indictable conspiracy to conspire to prevent the course of justice, by producing a false certificate in evidence, to influence the court's opinion, where a fair certificate is legal evidence, as of justices that a high-way is in repair. The indictment in this case stated the whole proceedings.

6 D & E. 619,  
Rex v. Maw-  
bey & al.

§ 8. This was an indictment against the deft. and two others, for that they "wickedly and unlawfully did among themselves conspire, combine, confederate, and agree falsely, and without any reasonable or probable cause, to charge and accuse the said John Chilton, that he the said John Chilton had then, lately, before taken out of a bag, a quantity of human hair," the goods of Rispal, &c. The indictment also stated, the defts. compounded with Chilton, and took of him £30, and his note for £33, to desist from all prosecution against him. Held, this was a good indictment, and lay in the Sessions, "a conspiracy being a trespass, and tending to a breach of the peace," and that the *gist* of the offence is the unlawful conspiring to injure the man by this false charge.

1 W. Bl. 368,  
King v. Rispal.—3 Burr.  
1320, same  
case.—2  
Burr. 943.—  
1 Yelv. 46,  
to indict one  
as barrator.

By the common law clearly every confederacy, wrongfully to prejudice a third person, is highly criminal, as where several confederate by indirect means to impoverish a third person. A conspiracy to raise wages is indictable at common law. 8 Mod. 10, R. v. Journeymen Taylors.

1 Haw. 191.  
—Crown C.  
Com. 286.—  
1 Stra. 144.

### ART. 3. Evidence and forms.

§ 1. This was an indictment for a conspiracy to indict A for a capital offence. Held good, though the word *falsely* is not added to the first charge of the conspiracy, nor the particular cause there specified; and though not alleged, A was acquitted of it, as the conspiracy was actually carried into effect,

2 Burr. 993,  
Rex v.  
Spragg & al.



CH. 204.

Art. 4.

Crown Cir.  
Com. 267,  
287.

and the malicious indictment actually preferred. This was an indictment at common law; punishment was fine, imprisonment, and pillory. Several forms of indictments for conspiracies. As against two for conspiring, one of them should rob the other, with intent to charge the hundred. To charge a man with a rape, and preferring an indictment against him for the same, with an intent to get money from him. To charge a man with receiving stolen goods, to get money by compounding &c. To charge one with sodomy, to get money by compounding &c. To charge one with robbery, and preferring a bill &c. A conspiracy among workmen to raise their wages. For a conspiracy and defrauding one of £50 under pretence of getting his son an office. As two at least must confederate to make a conspiracy, if all but one be acquitted, he is acquitted. Hence no prosecution of a conspiracy lies against husband and wife, because but one person in law. A, B, and C indicted, A and B come in and plead, A is acquitted and B convicted. C then came in and was convicted. Judgment against B only on the ground C also was found guilty. But one conspirator may be convicted after another is dead. And if one be convicted, judgment may be against him before the other be tried. And a conspiracy may be laid without an overt act. And 3 Burr. 1262, *Rex v. Scott*. The *villanous* judgment is now obsolete. 2 Burr. 1027.

1 Haw. 192,  
s 8.

2 Stra. 1227,  
*Rex v. Nicholls*.

1 Stra. 193,  
*Rex v. Kinnersley & al.*  
—4 Bl. Com.  
136.

Crown Cir.  
Com. 287.—  
1 W. Bl. 392.

2 Burr. 998.

§ 2. On an information for conspiracy, the *fact* of conspiring need not be proved, but may be collected from other circumstances. A person convicted on an indictment of a conspiracy, cannot be a witness; but may be if pardoned.

*Rex v. Spragg* was an indictment for conspiracy to indict for a capital crime. Held good, though the word *false* was not in the first charge.

#### ART. 4. *American cases of conspiracy.*

2 Johns. Cas.  
391, *The People v. Olcott*.

§ 1. A and B were indicted for a conspiracy to defraud C, and the verdict found A and B agreed to obtain money of C, but with an intent to return it again. No verdict of acquittal, nor one on which any judgment could be given. Also held, the third might be tried and convicted after two had been indicted, and one died before trial.

1 Mass. R.  
473, *Commonwealth v. Ward & al.*

§ 2. In this case three were indicted and convicted, and sentenced to six months' imprisonment, and to find security of the good behaviour two years, for conspiring and for defrauding one Davis, according to their conspiracy, of sundry goods. They got his goods on credit under false pretences of opening shop &c.

2 Mass. R.  
329, *Commonwealth v. Three Judds*.

§ 3. Held, a conspiracy to manufacture base and spurious indigo, with a fraudulent intent to sell the same as good and genuine indigo, is an indictable offence, though no sale be

made. One count in the indictment was for selling the same at auction also. The jury found the fraudulent making &c. but did not find the sale. Defts. were acquitted of all but the first count, and that laid no act done in pursuance of the conspiracy. So the real offence was a conspiracy to manufacture a *base* article, and to sell it as a *good* one, generally, not to any particular persons. In this case, most of the English cases on this subject of conspiracy were cited and considered, and from them all, the court drew this correct result, namely, "that the *gist* of a conspiracy is the unlawful confederacy to do an unlawful act, or even a lawful act for unlawful purposes;" "that the offence is complete when the confederacy is made, and any act done in pursuance of it, is no constituent part of the offence, but merely an aggravation of it." "This rule of the common law is to prevent unlawful combinations." Sentence to pay a fine of \$50 each deft. with costs.

CH. 204.  
Art. 4.

Indictment against defts. for causing, by conspiracy, a ship insured to be sunk, 6 Wentw. 387, 389, six counts.

§ 4. So in this case the court decided the conspiracy being the *gist* of the offence, and acts done in pursuance of it being only matter of aggravation, any informality or uncertainty in alleging such acts will not vitiate the indictment: 2. In an indictment for a conspiracy to accuse one of a crime, it is not necessary to allege that the defts. procured, or intended to procure an indictment or other legal process: 3. "A conspiracy to charge any person with a crime, and in pursuance of the conspiracy falsely to affirm he is guilty, is an indictable offence, without procuring any legal process."

2 Mass. R. 536, Commonwealth v. The two Tibbets.

ART. 5. *Evidence that proves a conspiracy.*

§ 1. Proved at the trial the defts. together in a chaise came to Putnam's shop, (the person cheated;) that Warren went into the shop, leaving Johnson in the chaise; that in his absence Warren affirmed his name was William Lane, that he lived at Gloucester and carried on shoemaking there, and that by disappointment he had not by him the number of shoes he wanted for a shipment to the Havanna, and wanted to buy a quantity of Putnam on credit; thereupon Warren obtained a delivery of a quantity of shoes; that he told Putnam that Johnson was a man of credit who lived with him; that Johnson then entered the shop, which was small, and was there when Warren made and signed the notes for the shoes by the name of William Lane; but no evidence Johnson knew the tenor of the notes; that Warren went the next day to Putnam's shop without Johnson, and under the same feigned name, fraudulently purchased 200 pair of shoes more; that Johnson had 100 pair of the shoes thus sold, and by the name of William Smith sold them to one Chase. On a motion for a new trial, held, this evidence was sufficient to prove Johnson was a confederate with Warren in the same fraudulent design, especial-

6 Mass. R. 74, Commonwealth v. Warren & Johnson.—33 H. VIII. c. 1, adopted here, as to cheating by false tokens.

CH. 204. ly as he received and sold a part of the shoes, and gave no  
 Art. 5. evidence to explain his connexion with Warren.

9 Mass. R.  
 415, Com-  
 monwealth v.  
 Davis.

§ 2. This was an indictment for a conspiracy with others unknown, to compel one James W. Stearns to an unjust settlement of his accounts with Davis, and to alter the terms of a contract between them as to brewing, and stated how &c. The indictment also charged, that Davis with others affirmed to Stearns, that he, Davis, was greatly indebted in New York; that his creditors were then in town (Salem) and were about to attach Stearns' property for Davis' debts, that unless Stearns would give up the agreement and pay Davis \$150 for the net profits already made, and a salary of \$480 for the year following, all Stearns' property would be attached for Davis' debts; that Stearns giving credit to these affirmations, did pay Davis \$150 &c. whereby Stearns was cheated &c. Def't. found guilty. On motion in arrest of judgment, held, the conspiracy is the gist of the indictment, and the cheating is but aggravation. Judgment not arrested. The reasons urged by the def't. were, in substance, there was no evidence that Stearns was cheated: 2. that the facts affirmed were so absurd and improbable as not to be entitled to public credit, so did not constitute an offence against the public.

Indictment  
 for a conspi-  
 racy in bring-  
 ing a pauper  
 into a parish  
 &c. 6 Went.  
 398.

3 Burr. 1321.

§ 3. The Sessions has jurisdiction of conspiracy, it being a trespass and tending to a breach of the peace.

3 Mod. 220.

§ 4. If two only be indicted of a conspiracy and one is acquitted, it is also acquittal of the other.

French Pen-  
 al Code.  
 M'Nally,  
 420 to 430.

§ 5. The law of France on this subject deserves attention. This, art. 265 to 268, enacts, that any number of men organized for an evil purpose, or agreeing to share the profits of their misdeeds, are an association of malefactors, and the leaders punishable by hard labour for a limited time, and the others and all abettors by confinement.

East's C. L.  
 460, Rex v.  
 Lord Gray &  
 al.

§ 6. It is a conspiracy indictable at common law to entice a young woman under age to leave her father's house and to live in fornication with one of the def'ts., and concerting measures with her own approbation to carry her off and to conceal her for that purpose.

East's C. L.  
 461.

§ 7. It is a like offence to conspire to marry a pauper woman of one parish to a settled inhabitant of another.

2 Day's Cas.  
 206, Gardner  
 v. Preston.

§ 8. A conspiracy may be proved by proving a concurrent approbation in the persons conspiring of the acts of each other: 2. And after a connexion between them is proved, the acts of one done in pursuance of the conspiracy may be in evidence against all: 3. In a conspiracy to defraud A by falsely representing B to be a man of credit, evidence that such representations were also made by the conspirators to third persons, in consequence of which such third persons, without the conspirators' request,

made the same representations to A, whereby he was induced to trust B, is admissible.

Cm. 204.

Art. 6.

ART. 6. § 1. *Duelling* is a crime that affects individuals as well as the public; and may be ranked among crimes affecting individuals, as well as a crime against public justice.

§ 2. By the act establishing articles of war for governing the armies of the United States, it is provided, art. 25, "no officer or soldier shall send a challenge to another officer or soldier to fight a duel, or accept a challenge if sent, upon pain, if a commissioned officer, of being cashiered, if a non-commissioned officer or soldier, of suffering corporal punishment at the discretion of a court martial.

Act of Congress, April 10, 1806.—  
Act of Kentucky of Dec. 13, 1799, s. 6, 7.

§ 3. Art. 26. "If any commissioned or non-commissioned officer commanding a guard, shall knowingly or willingly suffer any person whatsoever to go forth to fight a duel, he shall be punished as a challenger." And all seconds, promoters, and carriers of challenges are deemed principals; and it is made the "duty of every officer commanding an army, regiment, company, post, or detachment, who is knowing to a challenge being given or accepted by any officer, non-commissioned officer, or soldier under his command, or has reason to believe the same to be the case, immediately to arrest and bring to trial such offenders."

Fine \$500, or twelve months' imprisonment, \$250, and \$150, &c. according to the part one takes.

§ 4. Art. 27 empowers every officer to part and quell all quarrels, frays, and disorders, to order officers into arrest, or non-commissioned officers or soldiers into confinement &c.

Art. 28 punishes as challenger "any officer or soldier who shall upbraid another for refusing a challenge," and discharges from any disgrace or opinion of disadvantage, all officers and soldiers, which might arise from their having refused to accept of challenges.

§ 5. Articles like these in substance, in relation to duels and challenges have ever existed in our military department. But exclusive of the military, Congress has never passed any statutes as to duels; but laws to prevent them have been left to the policy and wisdom of the State legislatures.

Where two persons deliberately agree to fight, and meet for that purpose, and one is killed, the other cannot help himself by alleging that he was first stricken by the deceased, or that he had often declined to meet him and was urged by importunity, or that he meant not to kill, but only disarm his adversary; for since he engaged deliberately in an act highly culpable in defiance of the laws, he must at his peril abide the consequences. And where the principal is guilty of murder the second is.

East's C. L. 242.—  
1 Hawk. ch. 31, s. 31.

§ 6. To incite one to fight a duel, though provoked by charges against his character, is a high misdemeanor, though

3 East, 581, Rex v. Rice. —East, 248.

**CH. 204.** no consequence thereon ensue against the peace. And if A  
**Art. 7.** make charges against B's character and conduct the most  
 grievous, and then B kills A in a deliberate duel, it is murder  
 in B and his second. These proceedings are at common  
 law.

6 East, 464,  
 Rex v. Phil-  
 lips.

§ 7. An endeavour by A to provoke B to commit the mis-  
 demeanor of sending a challenge to fight, is itself a misde-  
 meanor indictable, particularly where such endeavour is by  
 letter containing libellous matter. The sending such letter  
 being an act done towards procuring the commission of the  
 misdemeanor meant to be accomplished. According to this  
 and other cases, sending a challenge to fight a duel is a mis-  
 demeanor at common law indictable; also it is one, if I by  
 letter endeavour to excite A to send such challenge, on the  
 general principle above stated. Where it is a misdemeanor  
 to do an act, it is also a misdemeanor to attempt to excite one  
 to do it, and indictable at common law. Thus the common  
 law seems to punish every act in or leading to duelling.

Mass. Act,  
 March 15,  
 1805, Maine  
 Act. ch. 2.

§ 8. Section 6 of this act enacts, "that if any person shall  
 voluntarily engage in a duel with rapier or small sword, back  
 sword, pistol, or other dangerous weapon, to the hazard of life,  
 when no homicide shall ensue thereon; and if any person  
 shall by word, message, or in any other manner challenge an-  
 other to fight a duel as aforesaid, when no duel shall be fought  
 thereon, every such offender, and every person who shall be  
 knowingly a second, agent, or abettor in such duel or chal-  
 lenge," shall be punished as a felonious assaulter, and dis-  
 qualified to hold any office or place of honour, profit, or trust  
 under the Commonwealth for twenty years.

Section 7 punishes the acceptance of such challenge by  
 any one, and also his second &c., by imprisonment in the  
 common goal not exceeding one year,—and so disqualified  
 five years. The act passed June 30, 1784, sect. 3, directs  
 in what manner the coroner shall bury one killed in a duel, or  
 deliver the body to any surgeon to be dissected. Section 4  
 directs how the sheriff shall deliver the body to be dissected  
 or bury it, of him who is convicted of killing one in a duel.  
 These statutes are a revision, with some alterations, of the  
 statute on this subject, passed in 1719.

**ART. 7. Embracery** is also an offence against public jus-  
 tices, but hitherto has been very rarely complained of in the  
 United States. And prosecutions in England for this offence  
 have by no means been frequent. It is described as being an  
 attempt to influence a jury corruptly to one side by promises,  
 persuasions, entreaties, or money, entertainments, &c. It is  
 an offence at common law, and the usual punishment, fine  
 and imprisonment for the person embracing, and for "the

4 Bl. Com.  
 140.—  
 1 Hawk. 348.  
 —Ken. Act,  
 Dec. 19,  
 1801, s. 27,  
 26, 29, view-  
 ed as bribery.

juror so embraced, if taking money, a like punishment at common law; but in England by several statutes passed in the reign of Ed. III. perpetual infamy, imprisonment for a year, and forfeiture of tenfold value.

CH. 204.  
Art. 8.

This statute against *embracery*, maintenance, &c. has never been adopted by law or practice in Pennsylvania. But 1 Dall. 19, 20, court said, 2 Jam. I. c. 16, has altered; and decided otherwise, 1 Dallas, 67.

32 H. VIII. c.  
9.—1 Dallas,  
67, Morris'  
lessee v.  
Vanderen.

ART. 8. *Elections.*

§ 1. Other indictable offences, are frauds in elections, by putting in more votes than the person is entitled to. The principles of elections as involved in civil actions have been already largely considered in the great cases of *Gardner v. Ward & al.*, and *Kilham v. Same*, and some other cases. It now remains only to consider the indictable offence; and it is not frequent that frauds and malpractices in elections are indictable offences; one among many reasons is, many statutes have been passed in all the several States to preserve the purity of elections, and to prevent malpractices in them, and these statutes usually annex penalties to these practices, and make them recoverable in *qui tam* actions, commonly viewed as civil suits.

§ 2. It is by no means common for an indictment to lie on an act of Congress for a fraud in elections; but almost invariably if an indictment can be supported it is on some principle of the common law or some State statute.

Mass. Act,  
1800, c. 74.

§ 3. But as in this case of *Silsbee* it was held, that it is a misdemeanor at common law for a citizen who is a legal voter at a town meeting, to give in more than one vote for a municipal officer at one time of balloting, it is obvious indictments on the grounds of the common law may in time become very frequent. It was as late as 1812 this decision was made, and none earlier was found. This is then an important case. The indictment stated the town meeting holden in Salem, March 11, 1811, for the choice of town officers, and that the deft. "did then and there wilfully, fraudulently, knowingly, and designedly give in more than one vote for the choice of selectmen for the said town of Salem, at one time of balloting, to the great destruction of the freedom of elections, to the great prejudice of the rights of the other qualified voters in said town of Salem, to the evil example of others in like case to offend, and against the peace and dignity of the Commonwealth aforesaid, and the law of the same in such case made and provided." On motion in arrest of judgment the court held it clear this was an offence at common law; and that "it is a general rule, that where a statute gives a privilege and any one wilfully violates such privilege, the common law will

9 Mass. R.  
417, Com-  
monwealth v.  
Silsbee —  
Mass. Act,  
1806, c. 26.

**Ch. 204.** punish such violation." "In town meetings every qualified voter has equal rights and is entitled to give one vote for every officer elected. The person who gives more, infringes and violates the rights of the other voters; and for this offence the common law gives the indictment;"—and the conclusion of this one is proper for the case.

**Art. 8.**

§ 4. The general and very broad principle laid down in this case is, that whenever a statute gives one a privilege, as of voting, &c. and he abuses it to the prejudice of others, the common law punishes his offence, a misdemeanor, by indictment. And also, as was admitted in this case, every one knowing to the abuse, the bad vote, is a witness though prejudiced or not by it. If this decision is correct, and perhaps it is, is it not a little surprising that no prior indictment of the kind was found in England or in this country, in which votes enjoyed as a privilege have long been so numerous and frequent, and on which this privilege has been often abused? It will be observed, that the principle laid down in this case as the foundation of the indictment, to wit, the abuse of a privilege given by statute, does not apply to a case in which one having no right to vote puts in a vote; but in this case the prejudice to others is the same, equally a violation of their rights, equally improper to be the ground of an action to be brought by every voter injured, as such actions would be infinitely multiplied almost; and to reject the bad vote as the remedy would be no better in the one case than in the other; and for a remedy to wait for a statute to be passed must be alike objectionable in both cases. Thus far the reasons seem to be as strong for indicting a man for voting who has no right to vote at all, as for indicting one for giving two votes who has a right to give but one. But there is a difference in practice between the two cases. He that gives more than one vote must almost invariably transgress wilfully and knowingly, whereas often the non-voter may vote honestly, mistaking his right to vote. But this is a difference only in regard to the evidence, for there can be no difference where the non-voter knowingly and wilfully gives a vote; he as much infringes and violates the law, as the voter does who gives an extra vote to the prejudice of others; and in a case in which the remedy by action is impracticable, on account of the vast number usually injured, and would have a right to sue severally and individually; and, therefore, in a case in which any proper remedy must be a public suit or prosecution only. P. 18 to 26, many other provisions.

In Kentucky voting twice in an election, fine \$10, bribing \$100, &c.  
T. K. Laws.

Mass. Act, Feb. 24, 1796.—  
Maine Act, ch. 115.

§ 5. This act inflicts a number of penalties on town and other officers neglecting their duties in elections, and it provides, "that any elector who shall give in more than one vote

in any election, and any person who shall be disorderly in any such meeting shall forfeit," not above \$20 nor less than \$10. Section 6 provides, that all forfeitures incurred on this act may be recovered by indictment or by an action of debt in the name of, and to the use of the Commonwealth. This act respects State representatives, governor, lieutenant governor, counsellors and senators, electors of president, vice-president, and representatives in Congress. The third section in this act is the same as the fourth in the act next above, except in this act of 1801, the penalty is a fine not exceeding \$30, and this act also enacts, that if any person "shall, knowingly and designedly, give in more than one vote or list" &c.

CH. 204.  
Art. 8.

Mass. Act,  
March 7,  
1801.

§ 6. Section 4 provides, that no person vote until his name is found on the list of voters, on penalty not exceeding \$20 for each offence. Penalties inflicted by this act may be recovered by indictment in the Supreme Judicial Court, or by action of debt in any proper court, half to the State and half to the prosecutor.

See also  
Mass. Acts,  
March 7,  
1803; March  
16, 1806, and  
March 6,  
1810.

As it now is settled, that, if a man having a right to a vote gives in more than that one, he is indictable at common law, statutes to restrain illegal voting of this kind seem to be unnecessary, except as to ascertaining the amount of the fine or penalty, but it may be doubted if the legislature in 1796 and 1801, when it enacted the above penalties for giving such extra votes, relied at all on this indictment at common law.

§ 7. If it shall also be decided, that it is a misdemeanor indictable at common law, for a man to give in a vote who has no right to vote at all in the case, then no statutes will be of much importance to prevent such voting, either where the party has no right to vote at all in the case, or to one vote and he puts in above one, except as to the amount of the penalty or punishment;—the amount of the penalty not being limited at common law to any useful purpose.

§ 8. It is a settled principle in all our constitutions, Federal and State, that each branch in our legislatures, either senatorial or representative, has the clear and conclusive right to examine into, settle, and decide all questions of elections made of members of such branch, to the purpose of allowing or disallowing a member a seat in it, but not to any purposes of punishment.

§ 9. The French penal code not only expressly guards the rights of citizenship, voting, &c. but perhaps more carefully than our laws do. Art. 109, &c. Part of its punishments in many cases is the loss of the right of voting, and sometimes of citizenship for a time limited; perhaps in this case it is just to take from a man a privilege he violently or fraudulently takes from another. At any rate the mode of punishment in

A. D. 1806.



CH. 204.

Art. 9.



France must have a more powerful effect than ours to preserve the rights of citizenship and elections. This retaliation is an excellent kind of punishment in party cases, when inflicted by an impartial court. And art. 114 enacts, that "if a public functionary, or agent of the government, shall direct or commit an arbitrary act, in violation, either of individual liberty, or the civic rights of one or more citizens, or of the constitutions," he shall be punished by civic degradation. This is on a similar principle; this is retaliation, and punishes as a party, or an arbitrary officer, ought to be punished. This article is enforced by many others.

The act of June 16, 1813, made some small alteration in the regulation of elections.

*Art. 9. Escapes.*

Indictment  
for, Cro. C.  
C. 346, 352.

§ 1. This is an offence against public justice, and at common law. The nature of an escape, either negligent or voluntary, has been considered in Ch. 65, as also the civil remedy or action for it; but an escape is also a public offence in many cases, and to be prosecuted and punished as a crime. New York act makes it an offence punishable in the State Prison, for aiding a prisoner to escape, detained for any felony. Held, the warrant committing one must shew he is committed for felony; if not, aiding his escape is not indictable under the act. 10 Johns. R. 160, 161.

2 Haw. P. C.  
122.—1 Hale's  
P. C. 600,  
602.—Salk.  
211.—4 Bl.  
Com. 130.—  
5 Com. D.  
595, 596.

§ 2. The offence of escape before committed, by one taken from an officer, is punishable in the party himself, with fine and imprisonment; but the officer permitting such escape, either by negligence or connivance, is much more culpable than the prisoner. If therefore after an arrest the officer negligently permit the felon to escape, he is punishable by fine. And the negligent escape of a felon is not felony. A negligent escape may be, by an officer, or some particular person, who hath a felon in custody. If a prisoner for felony, break gaol, this seems to be a negligent escape, and therefore the gaoler, by law, may hamper the prisoner with irons to prevent his escape; but this must be to *prevent* an escape from the weakness of the gaol, or some attempt made to escape. But if a private person arrest a felon, and he escape by force from him, and without any default in him, he is excused, for he has no authority to raise the power of the county to retake him. But otherwise is the case with an officer. "A voluntary escape is when any person, having a felon lawfully in his custody, voluntarily permits him to escape from it, or to go at large; and this is felony in case the person be imprisoned for felony; and treason, in case the person be imprisoned for treason; accessory in one case, and principal in the other. But the officer cannot be punish-

1 Hale's P.  
C. 590, 591.  
—2 Chit. C.  
L. 171 to 178.  
—4 Bl. Com.  
130.

ed until the original offender be convicted; but before such conviction the officer may be fined and imprisoned for a misdemeanor. And if an officer have one in his custody charged with a trespass, and voluntarily let him escape, the officer is guilty of a trespass, whether actually imprisoned or only under a bare arrest.

CH. 204.  
Art. 9.

§ 3. *How escape is charged, &c.* Fell, the gaoler, was indicted for negligently suffering one Birkenhead, committed to prison, and charged with high treason, to escape. Held, this indictment was ill: 1. Because it should be also that B was committed for high treason, as well as charged, and the warrant of commitment set out; and if defective, the gaoler may take advantage of it: 2. The prisoner is in custody both of the gaoler and sheriff; and if committed to the sheriff, and the gaoler let him escape, the gaoler is punishable; for the sheriff answers for the faults of his gaoler, civilly only, and not *criminaliter*: 3. The court will not intend a pardon, but it must be shewn by the deft.

1 Salk. 272,  
Rex v. Fell.  
—5 Mod. 414.  
—1 Ld.  
Raym. 424.

But 2 Haw.  
135, principal  
may be fined.

§ 4. Under an escape warrant a man may be arrested on Sunday. And on Sunday a gaoler may retake, on a fresh pursuit, one who has escaped.

2 Ld. Raym.  
1028.—Salk.  
626.—Willes,  
460.—See Ch.  
65.—Ch. 150.  
Ch. 175.—  
Jones, 156.

§ 5. Where an escape is an offence on Sunday. And escape is no offence where the arrest is illegal. And the question often arises, what is a legal arrest on Sunday, or what is a breach of the peace, in fact, or constructively.

1 D. & E. 265,  
Rex v. Myers.  
—See 2 Inst.  
592.

In this case the deft. was convicted in a penalty under the lottery act, and committed, for want of a sufficient distress, on a Sunday; and discharged because he could not, on Sunday, be arrested for non-payment of a penalty, on a penal statute, to be recovered in an *action*, or a *summary proceeding* before a justice, being a *civil* suit. But otherwise if by indictment; for then the offence is constructively a breach of the peace; hence if arrested on a Sunday, on an indictment, and he escapes, the escape is an indictable offence; but not if arrested, on Sunday, for breach of a penal statute, and the penalty is to be recovered *civiliter*. This is the result of the authorities on this point; and therefore a very nice distinction appears not often attended to, in passing penal statutes, to wit: if the penalty is to be recovered on indictment, all the proceedings are *criminaliter*, and an arrest being on Sunday is good; but if on *summary process*, or in an *action*, then all the proceedings are *civiliter*, and no arrest can be on that day. And if arrested on that day there can be no punishable escape as to the prisoner, because no legal arrest of him. A writ of inquiry cannot be executed on Sunday,—and the court is bound to examine the almanack. Fortesc. 373; Stra. 387, Hoyle v. Cornwallis; Salk. 626; one may be arrested

3 Com. D.  
595—5 Mod.  
449—5 D. &  
E. 25, Atkin-  
son v. James-  
son.—Barnes,  
373.—8 D. &  
E. 86.—5  
Mod. 95.—2  
Saund. 290.

Cro. Jam. 496.  
—Cro. Car.  
210.

CH. 204. on a contempt warrant on Sunday, Willes, 459, 460; one  
 Art. 9. may voluntarily surrender, 1 Atk. 55; 12 Mod. 348; 2 Haw.  
 P. C. c. 8, s. 38; Cro. Jam. 279; Dyer, 168; 4 Inst. 130;  
 1 Vent. 107.

3 Com. D. § 6. And the prisoner himself may be indicted for an es-  
 596.—5 Mod. cape, though with the gaoler's consent, where lawfully com-  
 415. mitted; but the gaoler is not indictable for a negligent escape  
 of one not lawfully committed.

Several forms of indictments for escapes, Crown Cir.  
 Comp. 346, 352, and several authorities.

1 Hale's P.C.  
 595, 596.

Indictments  
 for rescue, 4  
 Wentw. 305,  
 309, 310.—  
 Cro. C C.  
 661, 668.

*One permitting an escape, when a crime.* If B, a mere private man, know C has committed a felony, B may arrest C, and C is in B's custody till discharged by delivering him to the constable or gaoler; and if B voluntarily suffer C to escape out of his custody, though B be no officer, nor is C indicted, B is guilty of felony. And so is the case if C in fact commit a felony, and B arrests him on suspicion, and probable cause. And if B deliver C, so arrested, to the constable, C is lawfully in his custody, and he is guilty of felony if he suffer a voluntary escape. And if a justice of the peace makes a *mittimus* to the gaoler, for a felony, with an unapt conclusion, as *till the justice give order for his delivery*, whereas it should be *till he be delivered by due course of law*, though this warrant be not formal, yet the felon is lawfully in the gaoler's custody, and if he voluntarily suffer him to escape, it is felony; for the gaoler is sufficiently ascertained of the crime with which he is charged. And Hale thinks, if the *mittimus* be general and contain no certain cause, though the gaoler is not bound to receive him on such *mittimus*, yet if he be acquainted what the crime is, for which he is committed, it is felony if he voluntarily suffer him to escape. For, says Hale, if a private person, or a constable, arrest a man for felony, and carries him to the common gaol, as he may, and the gaoler is bound to receive him by 4 E. III. c. 10, if the constable, or person that delivers him, informs the gaoler it is for felony, he, at his peril, lets him escape, though there is no *mittimus* at all, but only a notice *ore tenus*. An indictment for rescue must state for what the party was committed to a house of correction.

2 Stra. 1226,  
 Rex v. Free-  
 man.

1 Hale's P.C.  
 597, &c.

§ 7. *What is a voluntary escape or not.* If the prisoner be rescued, or rescue himself, against the will of him who has him in custody, this is no voluntary escape, nor is the gaoler punishable for it. So if the prison be fired, and the gaoler lets out the prisoners, and there being no other means to save their lives, and does all he can to keep them safe and fairly, or if enemies force him to open the prison doors, and he does it to save his life, it excuses from felony. So if it be

done by rebels, this excuses the gaoler from felony, and also from a fine, if it be *vis major, quam cui resisti potest*; though it does not exempt the gaoler or sheriff from a civil action, for reasons mentioned in a former chapter.

CH. 204.  
Art. 10.

§ 8. So if a justice of the peace bails a person not bailable by law, this excuses the gaoler, and it is not felony in the justice, but a negligent escape, for which he is finable at common law. So if the sheriff &c. bail one not by law bailable, it is not a voluntary escape, unless designedly done to deliver the prisoner forever, but it is a negligent escape punishable at common law. Kentucky Act, February 26, 1798, if an individual negligently let a prisoner escape, he may be fined on an indictment, if the prisoner be arrested on suspicion of treason, felony, or murder, and escape before brought to a gaol. Act, January 16, 1798; December 20, 1800.

As to breach of prison, see Prisons, post.

ART. 10. *Rescue.*

§ 1. This is an offence against public justice also, and differs from escapes only in this: in escape the party rescues himself; here, others rescue him and put him at large from his arrest or imprisonment. A rescue of one arrested for felony is felony; for treason, treason; and for a misdemeanor, a misdemeanor; for in felony the rescuer becomes accessory, and in treason and misdemeanor a principal; but here, as upon voluntary escapes, the principal must first be attainted before the rescuer can be punished; for otherwise it might happen that the officer &c. might be punished for treason or felony, and the person arrested and escaping might turn out to be innocent.

4 Bl. Com.  
130, 131.—1  
Hale's P. C.  
606.—Ch.  
148, *Molody*  
*v. Real*.—In-  
dictment for,  
Cro. C. C.  
661, 668.

§ 2. By the section 23, of this act, it is enacted, that the rescue of capital offenders, after conviction, shall be punished with death; before conviction, fine and imprisonment; and to rescue other offenders, before or after conviction, fine and imprisonment.

Act of Con-  
gress, April  
30, 1790.

§ 3. Section 1, of this act, provides a fine, \$500, for rescuing one fled to another State.

Act of Con.  
Feb 12, 1793.

§ 4. This act (old law revised) inflicts a penalty on a person who rescues cattle &c. taken up by a hayward, or other person, and driving to pound.

Mass. Act,  
Feb. 13, 1789.  
—Maine Act,  
ch. 128.

§ 5. To make a rescue a felony, at common law: 1. It is necessary the felon be in custody, or under arrest for felony, or suspicion of felony. Hence if A hinders an arrest whereby the felon escapes, he is only fined: 2. And if the felon be in custody of a private person, the rescuer must have notice the party is under arrest for felony: 3. But if in custody of the sheriff, constable, or in prison, the rescuer must take notice at his peril. He must be indicted. He is not put to answer by the officer's return of a rescue.

1 Hal. P. C.  
606, 607.—4  
Bac. Abr. Res-  
cue.

CH. 204. "As in case of an escape, so in case of a rescue, if the  
 Art. 10. party rescued be imprisoned for felony, and be rescued before  
 indicted, the indictment must surmise a felony done, as well  
 as imprisonment for felony, or suspicion of felony; but if the  
 party be indicted and taken by a *capias* and rescued, then there  
 needs only a recital that he was indicted *prout*, and taken and  
 rescued."

§ 6. "But though the rescuer may be indicted before the  
 principal be convicted and attainted, yet he shall not be ar-  
 raigned or tried before the principal be attaint," for the reason  
 above stated.

3 Salk. 311. § 7. Upon an unlawful distress, the owner of the cattle may  
 rescue them before impounded, but not after. On escape  
 brought against the sheriff, on *mesne* process, he may plead a  
 rescue, though he do not state the rescue was returned.

Act of Con- § 8. Sect. 5 of this act provides, that "if any person or  
 gress, April persons shall, after such execution had, (for murder), by force  
 30, 1790. rescue or attempt to rescue the body of such offender out of  
 the custody of the marshal or his officers, during the convey-  
 ance of such body to any place for dissection, as aforesaid;  
 or shall, by force, rescue or attempt to rescue such body from  
 the house of any surgeon, where the same shall have been  
 deposited in pursuance of this act," may be fined not above  
 \$100, and imprisoned not exceeding a year.

Act of Con- § 9. This act (sect. 2.) provides that any agent, appointed  
 gress, Feb. to receive a *fugitive* from justice from one State into another,  
 12, 1793. "who shall receive the *fugitive* into his custody, shall be em-  
 powered to transport him or her to the State or Territory from  
 which he or she shall have fled. And if any person or per-  
 sons shall by force set at liberty, or rescue the fugitive from  
 such agent, while transporting as aforesaid," the offender, on  
 conviction, may be fined not exceeding \$500, and be im-  
 prisoned not exceeding one year.

And Mass. § 10. Sect. 1, of this act of Congress, provides, when the  
 Act, June 18, executive authority of any State or Territory, shall demand  
 1801, to ap- any person as a fugitive from justice, of the executive autho-  
 point agents rity of any such State or Territory to which such person shall  
 &c. And have fled, and produce a copy of an indictment found, or an  
 Mass Act, affidavit made before a magistrate of any State or Territory,  
 Nov. 7, 1782. charging the fugitive with having committed treason, felony,  
 or other crime, certified as authentic by the governor or chief  
 magistrate of the State or Territory from whence fled, it is  
 the duty of the executive authority of the State or Territory  
 to which fled, to cause him or her to be arrested and secured,  
 and to give notice thereof to the executive making the de-  
 mand, or its agent appointed to receive the fugitive, and to  
 cause the fugitive to be delivered to such agent who shall

Maine Act,  
 c. 113.

appear, and if none such appear in six months from the time of the arrest, the prisoner may be discharged. Costs to be paid by the State demanding &c. CH. 204.  
Art. 10.

§ 11. In this case a person stole a horse in *Vermont* and fled into New York, where he was apprehended with the horse in his possession. Held, he could not be tried for this felony in the State of New York, but was to be viewed as a fugitive from justice, within the above law. Like decision, 2 Johns. R. 479. *Contra* 2 Mass. R. 14, *Andrews' case*. See Ch. 214, a. 2, s. 7. 2 Johns. R. 477, the People v. Gardner, and the People v. Schench.—2 East's P. C. 774.

§ 12. Sundry indictments for rescues of persons and of goods, Crown Cir. Com. 661 to 668, at common law.

§ 13. *Rescue*, as the subject of a civil action, was considered Ch. 65, and there defined &c.

§ 14. If the person rescued be indicted or attainted for several felonies, his escape or rescue is but one felony. Hale's P. C. 599.

§ 15. Where the imprisonment is so far groundless or irregular, or the breaking of the prison is of such necessity &c. that the party himself breaking it is by common law, or by the statute *de frangentibus prisonam*, saved from the penalty of a capital offender, a stranger who rescues him from such imprisonment is excused. 2 Haw. P. C. 139.

§ 16. The defts. were returned *rescuers*, on mesne process, and submitted to a fine. The court said, they must take the return to be true; but allowed the defts. to mitigate the fine to 1s. each, by shewing, in fact, there was no actual arrest, it being in the night. The court said, anciently there was a settled fine for rescuers, but lately they had been fined at the court's discretion, on considering all the circumstances of the case. Sect. 8, of this act, punishes rescuers &c. from the State prison, or other prisons &c. 1 Stra. 642, Rex v. Minify & al.  
Mass. Act, June 21, 1811.

§ 17. *Obstructing process* is a similar offence, and against public justice, and is a high misdemeanor, especially in criminal cases, as in preventing arrests, commitments, &c. and the offender becomes *particeps criminis*; that is, accessory in felony, and principal in treason and trespass.

§ 18. By sect. 31 of this act, as to ships &c. it is enacted, if any person assault, resist, obstruct, or hinder any officer in the execution of this act, or "of any other act or law of the United States, herein mentioned, or of any of the powers or authorities vested in him by this act, or any other act or law as aforesaid," he forfeits \$500 &c. Act of Congress, Feb. 18, 1793.

§ 19. A person was indicted for insulting and obstructing a justice in the execution of his office. The justice died pending the indictment. The court refused to discharge the indictment. 1 Wils. 222, The King v. Ellers.—2 Stra. 1226.

CH. 204. ART. 11. *Extortion* is another offence against public justice, and is indictable at common law. § 1. It is where an officer, by colour of his office, unlawfully takes from any man

money or any thing valuable, not due to the officer, or more than is due to him, or before it is due; the punishment is fine and imprisonment. The indictment for it states the commitment when by a gaoler &c., and the offence for which committed; that the prisoner is detained &c: yet the gaoler, not regarding &c. did, at — on — demand and receive £— of and from the said A. B. for care and favour in the said gaol, for the said time, in contempt of the Commonwealth, and against the peace &c. See the case of Justice Johonnot, in a former chapter, in which an indictment, containing one count at common law, and the other on our statute, was deemed bad, but amended by entering after conviction a *nolle prosequi* on one count.

§ 2. Sect. 7 of this act provides, that if any marshal or his deputy, "shall by reason or colour of his office, wilfully and corruptly demand and receive any greater fees than those allowed by this act," he forfeits a fine not exceeding \$500, or may be imprisoned not exceeding six months.

§ 3. Sect. 26 of this act provides, that if any collector or officer "shall designedly take any other or greater fees than are by this act allowed, or who shall receive any voluntary reward or gratuity, for any services performed, pursuant" to this act, forfeits for each offence \$1000, and is rendered incapable of serving in any office of trust or profit under the United States.

§ 4. And by the 29th sect. of this act, there is made a similar provision as to extortion &c.

§ 5. Indictment against a clerk for illegal fees in his office. But it is no extortion for an officer to take fees for serving an erroneous writ.

§ 6. "Every oppression by colour of justice or right is extortion," and is a great misprision at common law, and for it an indictment or information lies. And it is extortion if an officer refuse to execute process till his fee is paid, or takes a bond for it before execution sued. So if a ferryman take more for a ferry than is due by prescription. But an indictment or information for extortion, *contra formam statuti*, where the offence is at common law, must be quashed. But if a statute allows a fee to any officer, it will be extortion to take above that which the statute allows, and then the indictment may be against the form &c. So if he takes more than the legal fee in any other case. But it is no extortion for an officer to take a fee allowed by law, or reasonable fees allowed by ancient usage. And an officer may prescribe to take a fee for a thing, which is not an act within his office.

2 Leach, 794.  
—4 Bl Com.  
141.—Indictments &c. for,  
4 Wentw.  
146, 148.—  
Cro. C. C.  
353, 360.—  
Co. Ent. 383.  
—Herne,  
601.—Ken.  
Act, 415.—1  
Haw. 61 ch.  
68. s. 1.—  
Form of a  
g. t. suit on,  
26 H. VI,  
Bohun, 383.  
Act of Congress,  
May 8,  
1792.

Act of Congress,  
Dec.  
31, 1792, as  
to ships.

Act of Cong.  
Feb. 18 1793,  
as to ships.  
11 Mod. 60,  
137—Salk.  
330, 332.

Co. L. 366.  
—2 Rol. 263.  
—4 Com. D.  
149.—1 Salk.  
330.—10 Co.  
102.—4 Mod.  
101.

4 Burr. 2471.  
—2 Inst. 210.  
—Co L. 368.  
—6 Com D  
150, 151.—  
French Penal  
Code, art.  
174.—Indictment,  
Ras.  
Ent. 333.—2  
Inst. 210.

as twenty pence for a bar fee of every prisoner acquitted ; for this is not given for doing his office.

§ 7. An indictment against several for extortion, *colore officiorum*, is good ; for they might take so much, and afterwards divide it. And an indictment or information for extortion, where nothing is due, ought to state nothing is due ; and if for taking more than was due, it ought to state how much more. If an officer take a reward, voluntarily given him, and which has been usual in such cases, for the more diligent or expeditious performance of his duty, he is not guilty of extortion ; “ for without such a premium, it would be impossible in many cases to have the laws executed with vigour and success. But clearly, a promise to pay an officer money for doing a thing, which the law will not suffer him to take any thing for, is merely void, however freely made. Several forms of an indictment for extortion, Crown Cir. Com. 253 to 360. *No accessories* in extortion. 2 Lord Raym. 1268.

§ 8. It has ever been the practice in Massachusetts to fix the amount of officers' fees, in almost every case, by fee bills, enacted from time to time ; and in each fee bill there has been a clause providing, “ that if any person shall, wilfully and corruptly demand and receive any greater fee or fees for any of the services” enumerated, than are allowed by the statute, he shall forfeit and pay a sum named for every offence, to be recovered by indictment &c., sometimes by action of debt ; time of prosecution usually limited to one year. See Fees for some constructions of such acts.

Indictment against a miller for taking too much toll.

ART. 12. § 1. *Forcible entry* is also an offence punishable by statute and at common law,—is properly an offence against the peace. It is committed by violently taking possession of lands and tenements, with menaces, force and arms, and without the authority of law. And by statute it may be where there is a right of entry, for the law now allows only a peaceable entry. The essence of this offence is seen in the form of the indictment for it at common law.

§ 2. As stating the defts. (twelve of them) at — on — with force and arms, unlawfully, and injuriously, and with a strong hand entered into a certain mill &c. being in the possession of M. Lewes, and him from the possession thereof, unlawfully and injuriously, and with a strong hand expelled and put out, and unlawfully and injuriously kept him out, and still keep him out against the peace &c. On demurrer adjudged good, though objected this indictment charged only a private trespass, and not a public breach of the peace indictable. *Curia*, “ a mere trespass which is the subject of a civil action, and where the words, *vi et armis* are introduced as a

CH. 204.  
Art. 12.

4 Com. D.  
151.—1 Stra.  
73.—3 Leo.  
268.—2 Bac.  
Abr. 453.—  
Cro. El. 654.  
—Moore, 468.  
—Cro. Jam.  
103.—1 Haw.  
171.

Mass. Fee  
Bills, Feb.  
13, 1796 &c.

Not extor-  
tion to take  
fees for trou-  
ble in a prior  
case, 15  
Mass. R. 525.

5 Mod. 13,  
Rex v. Wards-  
worth.

4 Bl. Com.  
147, 148 —  
Indictments  
&c. for. 4  
Went. 148 to  
151.—Cro.  
Q. C. 361 to  
372.

Rex v. Wil-  
son & al.  
The ancient  
English stat-  
utes on this  
subject. 5. R.  
II. ; 15 R. II. ;  
8 H. VI. ;  
and the 31  
of Eliz. said  
by Kent. C. J.  
4 Johns. R.  
200, to be  
literally copi-  
ed in succes-  
sion into the New York statute.



CH. 204. mere matter of form, cannot be converted into an indictable offence. But there is no doubt but that the offence of forcible entry is indictable at common law, though the statute gives other remedies to the party grieved, restitution and damages.<sup>2</sup> The facts in this indictment being proved as laid "amount to an indictable offence." Here twelve men entered, unlawfully, with a strong hand, and with a strong hand and unlawfully expelled the possessor. This "is clearly a breach of the peace." The words, said Grose J. *with a strong hand*, mean something more than a common trespass. And Lawrence J. added, these words also are sufficient in an indictment on the statute, (cited Cro. Jam. 41) they import something criminal in its nature. Lord Kenyon added, it appears the defts. entered "unlawfully, and therefore it cannot be intended that they had any title." This was said by way of reply to what is said by Hawkins, to wit, "that at common law the party may enter with force into that to which he has a legal title." Threatening to spoil A's goods if he do not quit possession, is not a forcible entry.

3 Burr. 1732,  
1733.—2 Bac.  
Abr. 558

§ 3. But such an indictment at common law must contain on the face of it sufficient actual force, violence, unlawful assembly, riot, or other circumstances (as breaking into a dwelling-house &c.) otherwise it may be quashed on motion. It is not force to draw a latch and enter a house.

4 Com. D.  
200.—Haw.  
P. C. 138.—  
Co L. 267.—  
Crompt. 68,  
69, 70.—2  
Bac. Abr.  
559.

§ 4. Second. To enter into a church with force and violence is a forcible entry, and it may be by one alone, and an infant or *feme covert*; and if one alone having no right of entry uses force, all in company are guilty. So by breaking a door and entering, though no one be in the house. So though no actual ejection of the owner; so if the entry be by force to distrain for rent &c. So if accompanied with weapons &c. to excite terror among the people, though no force be used. But not if no actual entry, nor any forcibly made, as if he opens the door with a key or enters an open window. So if he in a peaceable manner entice the owner out of possession; though he afterwards open the door being only latched and enters, or afterwards excludes the owner by shutting the door, without other force; or if he imprisons the owner and then sends his servants and takes possession; though this is false imprisonment (if wrongful) but no forcible entry. Nor if after entry he cuts corn &c.; nor if no intent to do wrong, as going over land with force, or a great company, to a church or market. Nor if one enter a house to arrest a felon, nor an officer by force enter to do execution, or by warrant of law.

Indict-  
ments for  
forcible en-  
try, 6 Went.  
403, 404, 428  
to 430.

4 Com. D.  
201, &c.—  
Hawk. P. C.  
139, 146.—  
Cro. J. 199.—2  
Bac. Abr. 559.

§ 5. Third. *Forcible detainer &c.* is where one enters peaceably and then detains by force, as if he threatens a corporeal damage to one who attempts to enter, or repels him with violence; or keeps the door shut when the justices de-

mand entrance ; if he brings more arms or persons than usual in his family ; or if the lessee at the end of his term keeps arms &c. to oppose the lessor's entry, though no one attempt to enter,—and so if lessee at will. So if lessee with force resist a distress for rent ; but not if lessee at will denies an entry to his lessor when he demands it, or merely shuts the door against him when he would enter ; nor if one keep out a commoner by force of his own land. Cro. Car. 486. But by 8 H. VI. c. 9, any one in possession three years by himself or tenants may detain by force ; and so have been Massachusetts statutes on this subject. One joint-tenant may be guilty of this offence as to the other.

CH. 204.  
Art. 12.

§ 6. Fourth. The indictment must be certain as to the description of the estate entered upon or detained ; hence, *in unum tenementum*, is bad ; must shew what estate generally the party has, as in fee, or for life or years, at the time of the offence committed. Disseizin or expulsion must be positively laid, not by recital.

4 Com. D.  
203.

§ 8. Sixth. *American cases.* There is no statute of the United States on this subject. This act was stated in chapter 132, where our Massachusetts statutes on this subject were noticed in treating of estates by entry and possession, and considered as statute law, and in relation to entry and restitution by two justices, *quorum unus*, proceedings removed by *certiorari* &c.

Mass. Act,  
June 30,  
1784.—  
Maine Acts,  
ch. 63, and  
ch. 79.

§ 9. But as the proceedings on this act are attended with much trouble and expense, and the common law sufficiently punishes the forcible entry or forcible detainer ; recourse has been rarely had to this act or will be probably, unless where immediate restitution is sought for. But the indictment at common law will be resorted to for punishing the injury on the part of the public.

Act of Vir-  
ginia of 1789.

§ 10. In many of the States there are, and long have been, special statutes on this subject, but different in several respects ; some have only made provision for immediate restitution of possession, others also, for a statute indictment for the offence. The indictment must state a seizin in the prosecutor at the time of the entry, and describe the deft's. entry : 2 Where the proceedings are reversed the court may order restitution. 1 Caines' R. 125, *The People v. Shaw*. As to costs, *Id.* ; 2 Caines' R. 98.

§ 11. Seventh. In Pennsylvania indictments for the offence have been supported ; and as to them it has been held : 1. That stating the person entered upon was disseized, necessarily implied his previous seizin. *Commonwealth v. Fitch*.

4 Dallas, 212.

§ 12. 2d. That in an indictment for a forcible entry and detainer, title to prevent restitution cannot be given in evidence, but restitution lies only against parties to the record.

1 Dallas, 68.  
12 Salk. 687.

CH. 204. § 13. 3d. But if the indictment state the person entered upon was seized in his *demesne* as of fee, but saying not when, and if it state he was so seized, and then that he was possessed thereof as aforesaid, the court will not for these matters arrest the judgment.

1 Dallas, 66,  
Respublica v.  
Shryber & al.  
1 Dallas, 68.

§ 14. 4th. The wife of the prosecutor is a witness to prove the force, but the force only.

1 Dallas, 354.  
—2 Salk.  
587, 588.

§ 15. 5th. But the proceedings were quashed, because the indictment only stated the party was possessed, but laid no term or estate. An inquisition for a forcible entry was quashed, but restitution denied, as there was an outstanding lease, and to travers the inquisition is a supersedeas to restitution.

8 Johns. R.  
464, The  
People v.  
Runkel.

§ 16. Eighth. In New York, 11 Sess. c. 6, an act was passed to prevent forcible entries and detainers. On this act there appears to have been several indictments. Among others, an indictment for the forcible entry and detainer of a church &c.; and held, the trustees of it, as such, could only be constructively possessed of it; that the possession of the key of it by one of them was *prima facie* evidence of possession, but not to exclude an inquiry who were in fact legal trustees at the time of the entry.

2 Johns. Cas.  
400, The  
People v.  
Butcher.—  
6 Johns. R.  
334.

§ 17. By this act there may be an indictment before two justices, and this may be removed by *certiorari* of course to the Supreme Court. As in this case in which it was decided, that if the deft. did not appear and plead, the prosecutor should have had him called to plead or abide by his former plea &c. And in which also, it was decided, that the landlord might be let in to defend in an action of forcible entry and detainer, as well as in ejectment.

4 Johns. R.  
198, The  
People ex re-  
lat. Corless  
v. Anthony.—  
Act 11th sess.  
c. 6, s. 2.  
The grand  
jury found an  
indictment,  
and the petit  
jury tried it,  
both sum-  
moned by  
the justice.  
8 Johns. R.  
44, Mather v.  
Hood—Laws  
vol. 1, 101.—  
2 Ld. Raym.  
1514—2

§ 18. Held, a justice proceeding on this statute need not previously go in person to view and record the force, nor need the traverse to an indictment for a forcible entry and detainer be in writing; that on such an indictment the jury may find the deft. guilty of the detainer only; that a fine is required to be imposed on the offender only when there is a conviction on view according to the act. Cited 1 Phil. Evid. 164.

§ 19. The record of conviction by a justice on this act is not traversable. And if it shews he had jurisdiction and proceeded regularly, it is conclusive and a good bar to any action brought against the justice, copied merely from 15 Rich. II. c. 2; hence, the English decisions apply. 4 Johns. R. 498.

Various forms of indictments for forcible entry; see Crown. C. Comp. 361 to 372.

§ 20. Ninth. As there are many statutes in England on Stra. 794.—9 Johns. R. 147, The People v. Runkel.—Is enough the parties and injury are stated with sufficient certainty to ascertain them and to award restitution.

this subject variously worded, not generally adopted here, the many indictments there framed on the words of these statutes can be but of little use in our practice. Nor have we occasion to perplex our proceedings with them, as we can always indict the offence at common law, and such immediate restitution of possession on our own statute. There is one principle however settled on those statutes which applies in our cases of restitution, to wit, there can be no restitution awarded, unless it be found the party grieved was *ousted*, and also the *ouster* continues his possession. Bacon Abr. Forcible Entry.

CH. 204.  
Art. 12.

§ 21. Tenth. If one have a right of entry and enter peaceably, and holds by force, *quare*, if the justices can remove him, though he has been in possession less than three years; they are not judges of the right, but only of the possession. "As if a man gets peaceably into his own, it seems he may defend it by force." And where the jury have found as to the entry *ignoramus*, and as to the detainer *vera billa*, the indictment has been quashed, and the restitution granted upon it set aside, and a restitution awarded. In the complaint to the justice on the statute, the plt's estate in the lands and tenements entered upon forcibly must be specified.

2 Bac. Abr.  
559.

1 Pen. 108,  
Van Aulen v.  
Baker.

§ 22. Eleventh. This question examined, namely, *A has a right of entry, and enters peaceably, but holds over by a strong hand*; can the justices, on the statute, remove him? Clearly not, if his right of possession continues; because having lawfully gained possession, so long as it continues lawful he must have a right to defend it, and he that attempts to remove him is the wrongdoer, as but one can have the right of possession at the same time, unless joint-tenants &c. But though A thus gains a rightful possession, as where he rightfully and peaceably enters, as lessee at will, or for years, or one as guardian &c.; his rightful possession being for a time only, after that is elapsed, this possession ceases, and he that would remove him has a right of entry and of possession accrued; as the lessor after the term of his lessee is expired; or as the mortgagee when he elects actually to enter and take possession; as the mortgagor, after he has fully paid the debt, and the mortgagee, who legally entered, has no right longer to keep possession, and other like cases, and he in possession detains with a *strong hand*. It is said above the justices cannot inquire into his title, but only his possession.

§ 23. This question is to be decided on a fair construction of our statute of June 30, 1784. That act, as Ch. 132, a. 6, provides, the justices, by a jury, inquire into unlawful and forcible entry and detainer, the same with a *strong hand*. So far there are three points of inquiry: 1. Was the entry lawful: 2. Was it forcible: 3. Does he detain with a *strong*

CH. 204. *hand*. If the facts be found in the affirmative, there must be restitution. Again, this act provides, that the two justices, by

Art. 12. a jury, inquire also against those who, having a lawful and peaceable entry, unlawfully and by force hold the same, and, when found, to make restitution to the complainant. This clause goes expressly on the ground, that though the deft. had a lawful and peaceable entry, yet if he holds unlawfully, and by force, he is removable. This act applies the words, *strong hand*, to any entry, to expelling, or detaining. Thus, if it be found, the lands or tenements, "*after a lawful entry, are held unlawfully, and with force and a strong hand*," then restitution is to be made; and the proviso is, that this act shall not extend to "any person who hath had the occupation, or been in the quiet possession of any lands or tenements, by the space of three whole years together, next before, and whose estate therein is not ended or determined." The justices then inquire *if his estate is ended*. So by the act they inquire of an unlawful entry. So the jury, by the act, must find an unlawful entry, or an unlawful detainer, as well as force and a strong hand. The words of the act then are clear, that if the party unlawfully detain, with a *strong hand*, after his estate is ended, he may be removed; also, at common law, indicted; but it is the *unlawful force and strong hand* only that is indictable. Yet these words in the act construed literally, would carry us much further than the practice has gone. For instance, A mortgages lands to B and B enters and so has lawful entry and possession; A pays the whole debt, whereby B's estate in the land is ended; A demands the land of B, and he refuses, and with a strong hand, to give it up to A; hence he unlawfully detains it. This case seems to be within the words of the statute; yet no removal has been known on such grounds; and probably because it is obvious that this case, like many others, involves in it too much law and difficulty for such a court as that of two justices; and the usual consequence is, if an inadequate court be appointed to execute a statute, it usually is not executed at all, as has been the case nearly of this statute. In this case of *detainer*, though the justices ought not perhaps ever to inquire of the title, any more than in the case of entry, yet it is clear they must inquire into the right of possession, otherwise a man defending his lawful possession by force, as he may, would be liable to be removed from it; and it may also be clear that he who claims to have the possession given to him must have a right of entry; for if he, by his negligence or acts, has lost this, he does not seem to bring himself within this summary process. On the whole it seems to be a fair construction of the statute, that if the complainant has a right of entry, and

East's C. L.  
246, Ford's  
case. —Cro.  
Jam. 19 &  
151, Ford's  
case.

the estate of the deft. is ended, and he detains *unlawfully and with a strong hand*, he may be removed on this statute. In the English practice, indictment for forcible detainer states usually a peaceable entry. CH. 204.  
Art. 12.

§ 24. *Forcible entry &c.* A justice, on his view, can only fine and imprison the party guilty of force, but cannot make restitution but by a jury. As where on a complaint of George Depeyster against Shotwell & al., that he had entered D's dwelling house, and expelled him, and held him out with a strong hand; the justice went to the house, and saw S. Briggs, with force, unlawfully, with strong hand, detain the messuage, and so he convicted him of the same. Briggs held the house under and for Shotwell. 10 Johns. R.  
304, Shot-  
well's case,  
&c.—Jus-  
tice's record.

A motion was made in the Supreme Court, that Isaac Clason, George Depeyster, and William A. Thompson, show cause, by May 14, why Gilbert Shotwell and Samuel Briggs, or either of them, should not be restored to the possession of a dwelling-house and farm, in Yonkers, wherefrom they, or one of them, was expelled. By several affidavits &c. read, it appeared there was no force or violence. Shotwell, October 12, 1812, purchased the estate at the sheriff's sale, as the property of Haskin, whose tenant Depeyster was, and he, on the sheriff's executing the deed, voluntarily gave up possession, and agreed, in writing afterwards, to stay one day, as tenant to Shotwell. October 18, D. moved away; and October 30, Briggs was put in possession by Shotwell, and remained till turned out, February 5, 1813. Possession was taken for Clason, and continued, he claimed the estate. Held: 1. If a *certiorari* be issued to a justice to return his proceedings in case of forcible entry and detainer, and he dies before his return is made, the Supreme Court will hear and decide the case on motion and affidavit: 2. Proceedings under the statute of *forcible entry and detainer*, may be quashed in this court for irregularity, and restitution awarded to the aggrieved party, on motion and affidavits; where a justice on his own view, without any jury, ordered or permitted restitution of possession, held, to be irregular: 3. Where the justice acts on his own view he can only punish as above: 4. He cannot meddle with the possession, without the intervention of a jury: 5. Where his proceedings are quashed for irregularity, it is of course to order a restitution. We cannot, said the court, investigate the title on affidavits; "the only inquiry is, as to the force, and the regularity and equity of the proceedings." Spencer J. (dissenting;) he doubted if the justice turned Briggs out, or did more than countenance Depeyster &c. in turning him out, and thought he, the justice, did not make restitution to Depeyster, and that Haskin had

N. York act,  
(Sess. 11, c. 6.)  
is a copy, ver-  
ry nearly, of  
the English  
acts.

CH. 204. only a mere temporary interest in the estate, and that Clason  
 Art. 13. was the owner of it. Many English cases were cited, most  
 of which are cited in this work ; also the *King v. Stacy*, 1  
 Sid. 287 ; the *King v. Elwell*, Stra. 794. New York cases ;  
 The *People v. Shaw*, 1 Caines' R. 125 ; Same *v. King*, 2  
 Caines' R. 98 ; 4 Johns. R. 198, above.

*Notes.*—It will be observed the law in New York, on this  
 subject, is nearly the same as in Massachusetts, for a reason  
 very common, these, as other States, have copied from the  
 English laws.

Mass. Act,  
 Jan. 29, 1795;  
 & Virginia  
 Acts of 1786.

ART. 13. This *going &c. armed* is an offence against the  
 public peace ; no doubt was an offence at common law ; but  
 particularly punishable by 2 Ed. III. c. 3. And so by this  
 statute, the Province law revised, this offence is also punisha-  
 ble. See this act cited, Ch. 201, a. 7. This offence is usu-  
 ally cognizable by a justice of the peace, if it amount not to  
 a riot. The like offence is the riding &c. with naked scythes,  
 and punishable in the same manner by the same act. The  
 offence is in going or riding with dangerous weapons &c., to  
 the terror of the people.

ART. 14. *Menacing letters sent.*

4 Bl. Com.  
 144.—French  
 Penal Code,  
 a. 305 to 308.

§ 1. This is another offence against the peace, when de-  
 manding money or other valuable thing, or threatening without  
 any demand, to kill or burn the house of any person. This  
 offence was high treason, by 8 H. V. c. 6.

§ 2. This is an offence at common law to send menacing  
 or threatening letters, demanding money, or threatening a  
 prosecution, by a public officer, to recover statute penalties  
 &c. for the purpose of obtaining money to stay the prosecu-  
 tion ; but then it must be such a threat as a firm and prudent  
 man may not be expected to resist.

6 East, 126,  
 Rex *v.* South-  
 erton.

§ 3. In this case the letter threatened to put in motion a  
 prosecution. An attorney sent the letter, dated August 23,  
 1803, to R. & W. Allen : "Sirs, I (the deft.) am applied  
 to, to prosecute an information against you, for selling certain  
 medicine without stamps. I have told the parties that all such  
 informations must now be prosecuted by the public officer, and  
 have advised them to let me write you on the subject, and  
 hear what you have to say. If I can be of any service to  
 you in stopping them, you will write to me accordingly, and I  
 will get the best terms I can." The information charged that  
 he wrote this letter with intent to extort and procure money  
 from said Allens, for the purpose of preventing said prosecu-  
 tion, in his letter alleged to be intended against them, from be-  
 ing commenced, to their great damage, and against the peace ;  
 there were other counts to the number of fourteen, none of  
 them concluded against the form of the statute. After convic-

CH. 204.

Art. 14.

tion, motion in arrest of judgment, on the ground this was no offence at common law, being nugatory, only a mere attempt at extortion. On the first argument, the court doubted if this was an indictable offence, at common law, "being no more than a threat to bring an action of debt for penalties under a statute, which a firm man might well be presumed to resist;" observed, the information was not framed on any statute; and asked if before 30 Geo. II. c. 24, "there was any case in the books of an indictment at common law, for such a threat, even where money was obtained, unless where the threat was of personal violence, or calculated to create such fear as might be supposed to operate in *constantem virum*, so as to constitute robbery; or unless the offence was laid in conspiracy." On the second argument, the attorney general, Gibbs, argued much at large, that this was an offence indictable at common law, and before 18 El. c. 5, s. 4, and laid down sundry principles, and cited many cases, particularly *Rex v. Scofield*, and *Rex v. Higgins*, proving "that an attempt to commit a misdemeanor by any act done towards its completion, though not effectual to the purpose, is itself a misdemeanor." "So where a statute creates a misdemeanor, any attempt by overt act to commit such offence must be itself a misdemeanor, at common law;" "by the same rule as where a statute creates a new felony it draws after it all the incidents of a felony at common law, such as accessaries before and after the fact, and misprision of felony." "Here the 15th count alleges facts which would constitute a misdemeanor under the statute 18 Eliz. c. 5," "the attempt to commit such misdemeanor as laid in the other counts, must necessarily be a misdemeanor at common law." Judgment arrested. Principal reasons stated by Lord Ellenborough C. J. "To obtain money under a threat of any kind, or to attempt to do it, is no doubt an immoral act; but to make it indictable the threat must be of such a nature as is calculated to overcome a firm and prudent man." "Now the threat used by the deft. at its utmost extent, was no more than that he would charge the party with a certain penalty for selling medicines without a stamp;" "this is not such a threat as a firm and prudent man might not and ought not to have resisted." The case of the *Queen v. Woodward & al.*, was a case of *actual duress*. "The law distinguishes between threats of actual violence against the person, or such other threats as a man of common firmness cannot stand against, and other sorts of threats." "Money obtained in the former cases under the influence of such threats may amount to robbery, but not so in cases of threats of other kinds." The case of *Mackarty and Fordenbourg*, was an exchange of unwholesome wine, not fit



CH. 204. for man to drink, and a deceit, but this is a case of *threatening*,  
 Art. 14. and not of deceit; and must be a threat of such a kind as will  
 sustain an indictment at common law, according to one case, either attended with *duress*, or according to others, such as may overcome the ordinary free will of a firm man, and induce him, from fear, to part with his money. "This is not the present case." It is a mere threat to bring an action which a man of ordinary firmness might have resisted.

*Große J.* thought it did not appear that any misdemeanor was intended.

*Lawence J.* thought, if it had been shewn that the Allens were guilty, and so had incurred a statute penalty, this might have been an indictable offence; for he agreed "there is no difference in the respect contended for, between an *attempt* to commit an offence at common law, and one which is created by statute." But the indictment does not shew "the deft. *attempted* to commit a misdemeanor." The deft's. name, however, was not allowed to remain on the rolls of the court.

In this great case it appears, first, to send a letter to one, threatening to sue him for a statute penalty, if he do not compromise, is not indictable at common law, because it ought not to overcome a man of ordinary firmness, but he may be expected to resist the menace.

Second. But it is so indictable if the threat be such as to overcome such a man, one firm and prudent.

Third. Therefore if the party menacing have the one threatened in *his custody*, and threaten to send him to prison, if he do not give money &c., this an offence indictable, for here a firm man, so in custody, may reasonably be overcome and yield to the threats.

Fourth. So threats of violence against the person, may well so overcome a firm and prudent man, and so be indictable.

Indictment  
for assault-  
ing, menac-  
ing with loss  
of life &c.,  
6 Wentw.  
392, 394,  
three counts.

Mass. Temp.  
Act, passed  
1749.

§ 4. It must be confessed it is very uncertain what is or is not a threat that may reasonably overcome a man of ordinary firmness and prudence, to induce him, when free and innocent, to give his money to avoid a suit for a statute penalty. And it is certainly to be wished, at least, that the law may find some principle less vague whereon to prove and punish crimes.

§ 5. The Provincial Legislature of Massachusetts attempted, by statute, to punish the offence of contriving or sending any incendiary or menacing letters in order to extort sums of money or other things of value from any of his Majesty's subjects. This act was kept in force till November 1, 1797. This act recited, that of late divers letters without a name were sent to such subjects, demanding large sums of money, and threatening destruction to their persons and estates, on failure

to comply &c., and enacted, "that if any person or persons shall send any such letter or letters without a name subscribed, or signed with a fictitious or counterfeit name, requiring or demanding any sum or sums of money, or any other valuable thing, knowing the purport thereof," or contrived or advised the same, or indited or wrote the same, on conviction, should be punished with the gallows, pillory, cropping, and imprisonment for three years, and hard work that time, and every three months in the three years be whipped twenty stripes. Also made a high misdemeanor to not make known such letters, though not concerned. Act ordered to be read in all March town-meetings. This act was suffered to expire in 1797; probably some extraordinary case gave rise to it. But it did not respect any person who signed his name to his letter. The kind of punishment inflicted by this act indicates more passion than usual in the legislature.

CH. 204.

Art. 14.



§ 6. Sending menacing letters, with a view to extort money, is indictable at common law. 2 Dallas, 297, 299.

§ 7. It will be observed, that so far as we have in this State any prosecutions in regard to threatening letters, they must be on the principles of the common law; and, therefore, prosecutions grounded on the English statutes on this subject, do not exactly apply in our practice. Still, however, these may be of some use, as in them some expressions used by the common law are well explained. In every society, the most moral, there will exist an evil disposition in some to extort, or get money or things of value by threats, by insinuations, by deception, or in some wicked way; therefore, in every nation there must be some law in force on this subject. And here it is the common law, which is not confined to threatening letters, but extends to other writings and means made use of for such wicked purposes. The mischief is briefly described in the said act of 1749, and more fully in the English black act, 9 Geo. I. c. 22; and acts 27 Geo. I. c. 15; and 30 Geo. II. and other English acts. And among other things, it is to be observed, that as to crimes, threats to charge one with, they extend only to crimes punishable with *death, transportation*, or other *infamous* punishment. And it will be noticed, that in *Rex v. Southerton* the insinuation did not extend so far.

Cited East's  
C. L. 1104,  
1126.

§ 9. The offence, at common law, consists in sending threatening letters &c., demanding money or other things of value; and menacing some destruction to person or property, or some penal prosecution on non-compliance.

In this case held, 1. That a threatening letter signed R. R. demanding a bank note &c. was a letter *without* a name: 2. That a bank note is a thing of value: 3. That it is sufficient

East's C. L.  
1110, 1116,  
Robinson's  
case, A. D.  
1796.

CH. 204. if the thing demanded be of value at the time of the demand made: 4. That a mere asking charity is not a demand the law notices, but it must be accompanied with some express or implied threat; a requisition that may operate as a force on the mind of the person to whom addressed: 5. That both previous and subsequent letters may be received in evidence of the letter set forth in the indictment, passed between the prosecutor and prisoner, relating to the subject matter of the letter so set forth, the threat in which was to publish a libel, accusing the prosecutor of a certain murder if he did not send a bank note: 6. That whether the letter do amount to a demand of money &c. or not, is a question for the judges to decide on reading it, as it is set out in the record.

2 Leach, 499,  
Hammond's  
case.

§ 10. Held, that if a wife write a threatening letter herself, without any interference of her husband, and send it by him without his knowing any thing of the contents, she alone may be found guilty, (on an indictment against both.)

Girdwood's  
case, 1  
Leach, 109.

§ 11. Held, that evidence the prisoner delivered a threatening letter sealed up to A, by whom it was put in the post, and so conveyed to the prosecutor, is sufficient to go to the jury that the prisoner sent such letter, knowing the contents: 2. A letter accusing D of having taken away the life of a friend of the writer, who is come to revenge him, is evidence to go to the jury of sending a letter threatening to kill and murder the prosecutor: 3. The trial may be in the county where the prosecutor received the letter by the post, though delivered by the prisoner, and put into the post in another county.

Jepson's  
case, East's  
C. L. 1115,  
1116, A. D.  
1798.

§ 12. Held in this case, that if A write a letter to B, threatening to burn a mill in which he once had an interest, but had sold it three years before, if he did not release a certain woman alleged to be confined by him; such letter as to the mill must be laid out of the case.

Heming's  
case, A. D.  
1799, East's  
C. L. 1116,  
1117.

§ 13. So decided in this case, that if A write a threatening letter to B, not subscribing his name, but in the terms of it so referring to facts and circumstances, as plainly must be intended to shew who the writer is, and demanding a sum of money in dispute between A and B, which B had received, and A had before insisted should be accounted for to him, is not a threatening letter within 9 or 27 Geo. I. and it may be added, not at common law; because the writer makes himself known, and demands a right.

Major's case,  
East's C. L.  
1118, 1122.

§ 14. Edward Major was indicted for sending a threatening letter, intending to extort and gain money. This cannot be supported by shewing a letter threatening to accuse the prosecutor of an unnatural crime, if he did not give up a certain bill, drawn by the prisoner, and held by the prosecutor. And

it is *sending* a letter to A, if it be placed where he is likely to find it, or it is likely to be found and delivered to him, as if put into his yard &c. CH. 205.  
Art. 1.

§ 15. It is a settled rule, that the indictment must set forth the letter itself, that the court may judge of it. Though these cases were mostly on the statutes, yet it is clear the points above stated hold good, and are law in common law cases; and so apply in substance in our practice.

§ 16. Spreading false news, fine, &c. at common law; Virginia, fine, binding to the peace, &c. Vir. Body of Laws, 5.

## CHAPTER CCV.

### FORESTALLING, ENGROSSING MONOPOLIES, AND REGRATING.

**ART. 1. General principles.** Forestalling &c. are offences against public trade, and have existed in all countries and ages, and will probably exist as long as men shall be influenced by avarice and a sordid love of gain; as long as many of them shall prefer living and gaining property by arts and contrivances in trade, to honest and laborious industry. These evils and offences have ever been seen, especially among trading people. Numerous have been the remedies which have been attempted to prevent them, and often but to little purpose. Engrossing, forestalling, regrating, and monopolies, are evils and offences generally seen, but often too indefinite, diffuse, and varying to be the subjects of criminal proceeding and of punishment. It is often extremely difficult to prove the facts and the frauds which really exist, and often when proved it is extremely difficult to bring them within the precise rules of criminal law; for these and many other reasons, probably not one offence of this kind in hundreds has ever been punished or prosecuted. Though these evils continually exist in our country, and especially in the vicinities of our large and commercial towns and long have existed, scarcely a prosecution for one of them is to be recollected. Often have statutes been specially framed and enacted to suppress them, but usually they have been a dead letter. Nothing more can be attempted here than to ascertain what is or is not forestalling &c., by what law, and how punished.

Information  
g. t. for fore-  
stalling bark  
to sell,  
against 1  
Jam. 1, 4.  
Went. 7, 9.

CH. 205. ART. 2. § 2. *Forestalling* is derived from *fare, via*, and  
 Art. 2. *stall, impedimentum*, and by the common law regrating and  
 ~~~~~ engrossing were comprehended within forestallment. 3 Inst.  
 195; 4 Com. D. 527.

4 Bl. Com.  
 158.—Act of  
 Virginia of  
 1777.

§ 2. Forestalling, as well as regrating and engrossing, "is also, an offence at common law;" and "is described by 5 & 6 of Ed. VI. c. 14, to be the buying or contracting for any merchandise or victuals coming in the way to the market; or dissuading persons from bringing their goods or provisions there, or persuading them to enhance the price when there; any of which practices make the market dearer to the fair trader." Said act of Ed. VI. empowering justices of the peace to inquire &c. of forestalling, regrating, and engrossing against the act by presentment &c., and to fine as on indictments, clearly recognized the offences as before well known. And as, Gilb. Cases, 276, it was decided, that an indictment for forestalling must be laid in the words of this act, (in substance common law in the United States) it may be useful to cite this statute *verbatim*, as the best ground to proceed upon in cases of forestalling &c. It enacts, "that whatsoever person or persons, that shall buy or cause to be bought any merchandise, victual, or any other thing whatsoever, coming by land or by water towards any market or fair, to be sold in the same, or coming towards any city, port, haven, creek, or road, from any port beyond the sea to be sold; or make any bargain, contract, or promise for having or buying the same, or any part thereof, so coming as aforesaid, before the said merchandise, victual, or other things, shall be in the market, fair, city, port, haven, creek, or road, ready to be sold; or shall 'make any motion, by word, letter, message, or otherwise, to any person or persons for the enhancing of the price, or dearer selling of any thing or things abovementioned, or else persuade, move, or stir any person or persons coming to the market or fair, to abstain or forbear to bring or convey any of the things above mentioned to any market, fair, city, port, haven, creek, or road, to be sold as aforesaid, shall be taken, deemed, and adjudged for a forestaller."

Forestaller,  
 indictments  
 for, Cro. C.  
 C. 372, 375.

Regrator, in-  
 dictments for,  
 Cro. C. C.  
 372, 375

§ 3. "That whatsoever person or persons shall by any means regrate, obtain, or get into his or their hands or possession, in any fair or market, any corn, wine, fish, butter, cheese, candles, tallow, sheep, lambs, calves, swine, pigs, geese, capons, hens, chickens, pigeons, conies, or other dead victual whatsoever, that shall be brought to any fair or market to be sold, and do sell the same again in any fair or market holden or kept in the same place, or within any other fair or market within four miles thereof, shall be accepted, reputed, and taken for a regrator or regrators."

§ 4. "That whatsoever person or persons shall engross, or get into his or their hands, by buying, contracting, or promise, taking, other than by demise, grant, or lease of any land or tithes, any corn growing in the fields, or any other corn or grain, butter, cheese, fish, or other dead victuals whatsoever, with intent to sell the same again, shall be accepted, reputed, and taken an unlawful engrosser or engrossers." The punishment in each of these three cases, fine and imprisonment. But there was a *proviso* that this act should not extend to fishmongers, butchers, poulterers, innholders, &c. who buy and sell in the usual course of their business, craft, or mystery, otherwise than by forestalling.

§ 5. 31 Ed. I. declared a forestaller to be a depressor of the poor and a public enemy, not to be suffered in any town.

§ 6. 25 Ed. III. c. 3, declared a forestaller of victuals or merchandise coming by land or water should forfeit the goods or value &c.

§ 7. On an information filed, the following were declared by the court, A. D. 1801, to be offences at common law, and not done away by the repeal of the 5 & 6 Ed. VI. c. 14.

§ 8. First. "Spreading rumours with intent to enhance the price of hops in the hearing of hop-planters, dealers, and others, that the stock of hops was nearly exhausted, and that there would be a scarcity of hops &c. with intent to induce them not to bring their hops to market for sale for a long time, and thereby greatly to enhance the price."

§ 9. Second. "Spreading such rumours generally, with intent to enhance the price of hops."

§ 10. Third. "Endeavouring to enhance the price by persuading divers dealers &c. not to take their hops to market, and to abstain from selling for a long time."

§ 11. Fourth. "Engrossing large quantities of hops by buying from many particular persons by name, certain quantities within intent to resell the same for an unreasonable profit, and thereby to enhance the price."

§ 12. Fifth. "And stating the particular contracts."

§ 13. Sixth. "Getting into his hands large quantities by contracting with various persons for the purchase, with intent to prevent the same being brought to market, and to resell at an unreasonable profit, and thereby greatly to enhance the price."

§ 14. Seventh. "Buying large quantities with like intent."

§ 15. Eighth. "Buying large quantities with intent to resell at exorbitant profit" &c.

§ 16. Ninth. "Unlawfully engrossing by buying large quantities with like intent."

§ 17. Tenth. "Engrossing hops of divers persons by

CH. 205.

Art. 2.

Engrosser, indictments for, Cro. C. C. 372, 375.

1 East, 143, 169, The King v. Waddington.

CH. 205. name, with intent to resell at an unreasonable profit, and thereby enhance the price."

Art. 3.

§ 18. Eleventh. "Engrossing hops then growing by beforehand bargains with like intent."

§ 19. Twelfth. "Buying large quantities of hops of divers persons mentioned, with intent to prevent their being brought to market, and to resell them at an unreasonable profit and thereby enhance the price."

§ 20. Thirteenth. "Buying all the growth of hops in several parishes by beforehand bargains, with like intent."

§ 21. Fourteenth. "Buying hops of divers persons with intent to resell at an unreasonable profit, and thereby enhance the price."

§ 22. Fifteenth. "Buying all growth of hops on certain lands in certain parishes by beforehand bargains, with intent to sell at an unreasonable price, and to enhance the price."

§ 23. Sixteenth. "Endeavouring to enhance the price of hops by persuading hop owners not to sell, &c."

§ 24. Seventeenth. "Engrossing by buying large quantities of persons unknown, with an intent to resell at an exorbitant profit."

§ 25. Eighteenth. "Buying large quantities with like intent."

Nineteenth. "Buying hops then growing, with intent to resell at an exorbitant price and lucre."

§ 26. Twentieth. "To forestall any commodity which is become a common victual and necessary of life, or used as an ingredient in the making or preserving any victual, though not formerly used or considered as such, is an offence at common law."

§ 27. Twenty-first. "Indictment for engrossing a great quantity of fish, geese, and ducks, held bad, without specifying the quantity of each." Same as to great number of dead wild-fowl."

§ 28. These various decisions as to hops will hold as to other articles of provisions, and being at common law are law in the United States, as well as in England generally.

§ 29. Persons may be indicted for engrossing &c.; but a great quantity of hay and straw is too general and uncertain.

ART. 3. *Engrossing*. This also is an offence at common law, and against public trade; has already been considered in a good degree in its intimate connexion, above, with forestalling. The offence in general "is the getting into one's possession, or buying up of corn or other dead victuals, with intent to sell them again." This is a great evil, as it puts it in the power of a few to raise the price of provisions at their pleasure. Most of the above decisions in Waddington's case

1 East, 583,  
Rex v. Gilbert.—  
1 Ld. Raym.  
475, Rex v.  
Foster.

Cro. Car.  
380, 381.

Indictment  
for, Cro. C.  
C. 374.—  
4 Bl. Com.  
168.

were as to this head, engrossing, and sufficiently explain the nature and extent of the offence committing every day in our country with impunity.

CH. 205.  
Art. 4.

ART. 4. *Regrating.*

§ 1. This offence is above described in the 5 and 6 Ed. VI. c. 14, second clause. Generally it is "the buying of other dead victuals, in any market, and selling it again in the same market, or within four miles of the place." This also enhances the price of provisions, as every successive seller must have his profits.

4 Bl. Com. 158.—Indictment for, Cro. C. C. 373.—1 Burn, 371.—Clift, 388.

§ 2. In these cases the old English statutes inflicted several severe punishments, different at different times; but it is not necessary to enumerate them, as we have adopted only the common law punishment, fine and imprisonment; possibly the pillory, in some very extraordinary case.

§ 3. Several forms of indictments, at common law, against a forestaller, a regrator, and engrosser.

Crown C. C. 372, 376.

§ 4. If a merchant, foreigner or subject, buy victuals or merchandise, within the realm, in gross, and sell them again presently in gross, this is engrossing; but not if he buys out of the realm in gross, and sells in it in gross. And salt is a victual, and engrossing it is punishable. And so as to every thing for the necessary use of man in eating and drinking. But it is said not to be engrossing if one buy corn with intent to convert it into meal, and then sell it; or to convert it into starch; or barley into malt. *Quare*, if not by statute.

3 Inst. 196, 196.

Many statutes, anciently made in England on these subjects, from 5 and 6 Ed. VI., downwards, made to enforce the same, were repealed by 12 Geo. III. c. 71; yet it is held there, that "these offences still continue punishable on indictment at the common law, by fine and imprisonment."

Cro. Car. 231.

Crown C. C. 374.

§ 5. "At the common law, all endeavours whatsoever to enhance the common price of any merchandise, and all kinds of practices which have any apparent tendency thereto, whether by spreading false rumours, or by buying things in a market before the accustomed hour, or by buying and selling again the same thing in the same market, or by any other such like devices, are highly criminal, and punishable by fine and imprisonment." "And the bare engrossing of the whole commodity, with an intent to sell it at an unreasonable price, is an offence indictable at common law, whether any part thereof be sold by the engrosser or not.

1 Haw. 235.  
—Crown C. C. 374, 375.  
—2 Bac. Abr. 572.—3 Inst. 196.—Hale P. C. 152.—Cro. Car. 231.  
—Moore, 596.

It is clearly safest, if not necessary, in all indictments for these offences to state the quantity and kind of the things ingrossed &c. and that they were coming to the market to be sold, or were corn or dead victuals in the market &c.



CH. 205. ART. 5. *Monopolies.*

## Art. 5.

Mass. Col. A.  
D. 1641.

11 Co. 84 to  
89.—3 Co.  
125.

4 Bl. Com.  
159.—3 Inst.  
181.

3 Inst. 181.—  
Skin. 169.—3  
Bac. Abr. 626.  
—2 Inst. 49,  
61.—2 Rol.  
Abr. 214.—  
Haw. P. C.  
231.—Raym.  
489.—Vern.  
127.—3 Mod.  
126.—11 Co.  
64.—Noy,  
182.—Jon.  
231.—3 Mod.  
75.—Vern.  
120.—10  
Mod. 107,  
137.—C. & P.  
Laws, 170,  
A. D. 1641.

§ 1. Monopoly is also an offence against public trade, and at common law. These are scarcely noticed in the laws of the United States, or in those of Massachusetts, but in general terms. This Colony early passed a law, declaring there should be no monopolies allowed, but of such new inventions as were profitable to the country, and that for a short time. There was a similar law in Connecticut. A monopoly is when the sale of any merchandise or commodity is restrained to one, or a certain number; and has, says Coke, three inseparable consequences: the increase of the price, the badness of the wares, the impoverishment of others. Hence, so every grant tending to a monopoly will be void, as if the king grants the sole making of cards &c. for twenty-one years.

§ 2. A monopoly in England is claimed under the king's license, or letters patent, "for the sole buying and selling, making, working, or using, of any thing whatever; whereby the subject in general is restrained from the liberty of manufacturing or trading, which he had before." Many monopolies existed in the time of queen Elizabeth, but were mostly abolished by 21 Jam. I. c. 3, except as to patents not exceeding the grant of fourteen years to the authors of new inventions.

§ 3. Monopoly and engrossing differ only in this, that the first is by patent from the king, the other by act of the subject, between party and party; but are both equally injurious to trade, and the freedom of the subject, and therefore are equally restrained by the common law. And it is further held, that monopolies are so restrained by the common law, that those guilty thereof are subject to fine and imprisonment by that law for this offence, as being contrary to the ancient fundamental laws of England. And on this ground the king's grant to any particular corporation solely, to import any merchandise, is void. And it is now settled, that an act of parliament only can exclude a subject from trade, or any branch of it; or from any honest manufacture, as the making of playing cards, or any other legal employment. So the king's grant is void, granting "the sole making of bills, pleas, and writs, in a court of law, to any particular person;" but the principle here stated does not extend to new invented arts, or to one first brought into the country. The principle of this act of 1641, has ever prevailed.

ART. 6. *United States.*

In these, the principles above stated have been fully adopted, and our legislatures are very properly restrained from granting monopolies, by our constitutions; at least this restraint is fairly to be drawn from their principles. The only difficulty is in this, what are the inventions and works of au-

thors, which may may be *exclusively* enjoyed for a term of years, under acts of Congress? CH. 205.  
Art. 6.

Comment.

This common law against these offences of forestalling, engrossing, regrating, and monopolies, has borne the test of ages, and have been wise and useful. The fault has not been in this law in the United States, but in the non-execution of it. Its notorious violations have often been complained of, but scarcely in any instances prosecuted; partly owing to the difficulty there has ever been in defining and proving these offences; and therefore the possible failures of prosecutions when commenced; but not wholly to this cause, for this difficulty is nearly the same in every country; yet in many countries in Europe, and in which there is a tolerable share of freedom, this kind of law has usually been tolerably well executed. But the principal cause to which the inexecution of this portion of the common law is owing, in the United States, is the easy and indulgent temper and character of the people generally, who have ever been disposed to suffer themselves to be cheated and imposed upon in these ways, by these kinds of offenders, in hundreds of instances, complaining generally, but never prosecuting. When, on any particular occasion, the evil has been very great, and high prices very sensibly felt, an effort has been made to produce a remedy, but not in the right way, that is, not by a steady and regular execution of this common law, and by preserving in circulation a uniform circulating medium, of known, general, and intrinsic value; but by a resort to price acts, to regulate prices of commodities and the necessities of life, absurdly supposing these prices can be regulated by law. An attempt of this kind was made in this State, in the year 1777. The legislature passed "an act to prevent monopoly and oppression." It recited that many avaricious persons, by daily adding to the then "exorbitant prices of every necessary and convenient article of life, and increasing the price of labour in general," had made it necessary to put a speedy stop to such prices &c., and enacted, that after a day named "the price of farming-labour, in the summer season, shall not exceed three shillings, by the day, and found as usual; and so in usual proportion at other seasons of the year;" and the labour of mechanics and tradesmen, and other labour, to be in the usual proportions; that articles enumerated, (almost every thing used in living,) should not be sold for a higher price than expressed in this act, namely, good merchantable wheat 7s. 6d. a bushel; good indian meal or corn, 4s. a bushel, (present monies 66 cts. and two thirds of a cent;) so each good merchantable article, as sheep's wool, 2s. a pound; fresh pork, 4d. half-penny a pound; hides, 3d.; flax, 1s.; cotton, by the bag, 3s.; rough tallow,

Сн. 205. 5*d.* a pound ; West India rum, 6*s.* 9*d.* a gallon, by the hogs-head ; New England rum, 4*s.* 6*d.* by the single gallon ; best Muscovado sugar, £3, (or \$10,) by the single hundred ; butter, 10*d.* a pound ; beef, well fatted at grass, 3*d.*, and stall fed beef well fatted, 4*d.* a pound ; mutton, lamb, and veal, 4*d.* a pound, and many other articles &c. ;—prices were meant for Boston.

It was soon found this law did not produce the desired effect. The penalties it enacted were disregarded. Soon after, to enforce it, an additional act was passed, and provision was made to vary some prices ; but all to no effect ; and after a few months' experience, and in the same year, both these acts were repealed, because, as the legislature acknowledged, they did not answer the purposes intended.

Two remarks on this measure deserve attention : 1. The evils in it, complained of, were not the common law offences described in this chapter, for there was no more forestalling, engrossing, &c. in 1777, than at other times ; nor was this measure an attempt to punish those offences, but it was to oblige all the people to sell at fixed prices, in fact for paper money, much depreciated, as then there was no money, but an accumulated mass of paper was in circulation, a thing utterly impracticable. It was, in fact, an attempt to oblige the people to sell many articles at half their value.

Second. The prices, in this act fixed, deserve attention. For instance, *farming labour in the summer season*, at 3*s.*, or 50 cts., a day ; stall fed well fatted beef, mutton, lamb, and veal, each at 4*d.* a pound, short of 6 cts. These were deemed average prices, payable in paper money, even after it had depreciated very considerably. Bread stuffs were then dear, because the people of Massachusetts could not then obtain their usual supplies from the middle and southern States, by reason of the then existing war, and the enemy having the command of the ocean. And, for the same reason, all imported goods were much dearer than in times of peace. Yet in the third year of the war the best Muscovado sugar was put at £3, or \$10, a hundred, &c. &c. This act is a part of the evidence which proves how much our prices have risen and money depreciated.

## CHAPTER CCVI.

## GAMING AND GAMING HOUSES, INNS. &amp;c. IDLERS, &amp;c.

ART. 1. *General principles.* Gaming, and immoralities in gaming-houses, inns, retailers' shops, play-houses, and idleness, are offences always associated and in company. Men are so made and constituted, that idleness is tedious, and constantly wants relief. How to pass away, or in other words, to kill time, is ever an inquiry among idle men, or men who want the steady and regular employments of industry, and rational pursuits. With such, one mode of relief has ever been, to resort to gaming, to gaming-houses, to taverns, grog-shops, play-houses, billiard-tables, &c. These, in their turn, have a direct and irresistible tendency to produce idleness, intemperance, and habits the most immoral and vicious. These are the places in which men often become intemperate, lazy, and immoral; and men, any way inclined to be of this description, are almost instinctively drawn to these places. Then, to regulate and keep in good order these places, is in effect, to correct, as well as to prevent, in many cases, intemperate and vicious habits. But idleness is sometimes sluggish and solitary, earns nothing, but constantly consumes and corrupts the man who lives by himself, and makes him a vagabond, and worse than useless.

ART. 2. *Gaming.*

§ 1. This, as it respects civil actions, has already been considered, and is in this article only to be treated of as an offence against the public police, or economy in a criminal view. What is gaming or not, has been in some degree considered. How far fair gaming, that is, playing fairly, was an offence at common law, does not appear; games ever have been, and are very different and numerous, and no doubt some of them were offences at common law, and punished by it, though conducted according to the rules of the plays. Others, no doubt, are not punished by that law. The true line of distinction between those so punishable or not, does not appear to be any where well drawn. However this may be, it is certain that *cheating at play*, by playing with false dice, cards, &c. was, and is an offence indictable at common law;—punishment, fine and imprisonment. And it is said, that <sup>3 Keb. 463,</sup> an information lies against one at common law, for using the <sup>610.</sup> game of cock-fighting.

CH. 206.

Art. 2.

Indictment  
for fraudu-  
lently win-  
ning money  
by betting at  
cards &c. 6  
Wentw. 383,  
384; for  
keeping a  
gaming-  
house, Mass.  
C. & P. Law,  
118, 119.

§ 2. This offence of gaming may, in this State, be reduced within a narrow compass, compared with gaming in England. No Federal law is recollected on the subject; indeed it is an offence, (except in Federal districts) left to the correction of State laws; and each State has had, and has, its own statutes on the subject, derived in general from the milder parts of the English statutes on this subject; but far less numerous and complex than those acts of parliament, which have been long, and now are extremely numerous and complex. See them enumerated, 4 Bl. Com. 171 &c.; 2 Bac. Abr. 621 to 625; and in many other books. It is clear that these acts have not been adopted in Massachusetts, because from her earliest settlement, there have been statutes *against gaming* enacted by her own legislature. As early as 1646, a statute was passed, forbidding any person to use the games of shuffle-board or bowling, or any other play or game, in or about houses of common entertainment, or any house used for such purpose; punishment fine &c. for the keeper of such house and the persons so playing: also, forbidding every person to "play or game for money or money's worth," at any time, upon penalty of treble the value &c.; also, every one to "be an abettor to any kind of gaming," on a like penalty; also, forbidding dancing in such houses upon any occasion. And in 1670, an act was passed, forbidding every person to bring any cards or dice into the Colony, or knowingly to keep any in his or her possession; punishment, corporal or by fine.

Maine Act,  
ch. 18, s. 138.

Mass. Act,  
March 4,  
1786.

§ 3. In 1742, another law was enacted against gaming, which was revised in 1786. "This act made void all securities given for money &c. won at play, as stated Ch. 34; and by sect. 3, it was enacted, that if any person convicted, on indictment, of winning at any one time or sitting, of any person or persons by gaming or betting" at cards, dice, or any other game, &c. any money, goods, or chattels, to the value of 20s. or upwards, and of receiving the same or security therefor, shall, besides forfeiting double the amount or value won and received to the poor of the town, be adjudged incapable of any office of honour or profit in the State for one year; but to be prosecuted in eighteen months after the offence committed. For money &c. won at dice, the indictment charges, that the deft. not regarding the laws of the Commonwealth, did on — at — with force and arms, by fraud, shift, deceit, circumvention, unlawful device, and ill practice, win, obtain, and acquire to himself \$— (above 20s.) lawful money of C. D. of and from him the said C. D. in and by playing with him at dice, to his great damage, against the form of the statute &c. and against the peace, &c.

§ 3. Sect. 5 provides, that if any person "play at cards,

dice, or billiards, or with any other implements used in gaming, in any tavern or house of entertainment, or place licensed for retailing spirituous liquors, or in any of the out-houses, yards, gardens, or appendages of the same, or shall in any of the houses or licensed places aforesaid, expose to view any of the implements aforesaid, or shall be seen sitting at any table therein with any of the said implements before him," on conviction thereof, on indictment or before a justice, he forfeits not less than 5s. nor more than 60s. to the poor &c. This act forbids every innholder, tavern-keeper, victualler, or person licensed as a retailer of spirituous liquors, to keep or allow any billiard-tables in their houses, yards, gardens, or other appendages, &c. or knowingly to suffer any person to play at the same, or at cards, dice, or any other *unlawful game*; on conviction on indictment, penalty \$50 to the use of the town &c. and the loss of his license &c.

CH. 206.  
Art. 3

Mass. Act,  
June 27,  
1798.—Maine  
Act, ch. 138.

§ 4. Sect. 2 forbids all private persons not so licensed to keep billiard-tables *for hire, gain, or reward*, or therefor allow any person to play at billiards, cards, or dice, or any other unlawful game, on penalty, on conviction on indictment &c. of \$50, to the use of the town, and surety of good behaviour &c.

See Acts of  
Kentucky,  
Dec. 13,  
1799, &c.

§ 5. Sect. 3 enacts, "if any person shall play at billiards, at any table kept or made use of for the purposes" mentioned above, on conviction, forfeits \$6 for every offence, recoverable before a justice to the complainant's use.

Virginia sta-  
tute against  
gaming, Vir.  
Body of  
Laws, p. 245.

And it is the duty of selectmen, sheriffs, deputy-sheriffs, constables, tithingmen, and grand jurors, to complain of the breaches of this act. Keeping a gaming-house was an offence at common law, and for it husband and wife may be indicted. Laws against gaming in Virginia, see Ch. 223, a. 18, s. 5,—District of Columbia.

10 Mod. 336.

### ART. 3. *Inns or taverns, and licensed houses and places.*

§ 1. These have always existed in every Colony, Province, and State, and have invariably been regulated by law; and it has always been a statute offence to keep any such inn &c. without a legal license. This act (the former laws revised) forbids any person "to be a common victualler, innholder, taverner, or seller of wine, beer, ale, cider, brandy, rum, or any strong liquor, *by retail*, or in less quantity than 28 gallons, and that delivered and carried away all at one time,"—excepted, legally licensed;—penalty £20, and a penalty not above £6, nor less than 40s. for selling, without license, at any time, any spirituous liquors, or any mixed liquors, part spirituous, half to the informer, and half to the county. This act also provides for granting licences yearly to persons recommended by the Selectmen; each licensed person must take an oath

Mass. Act,  
Feb. 28, 1787.  
—Maine Act,  
ch. 133 —  
Mass. add.  
acts of March  
12, 1806, of  
Dec. 14,  
1816, of Feb.  
12, 1819.—  
Kentucky  
Act to pre-  
vent idleness,  
Dec. 16,  
1795, and  
regulating  
Dec. 19, 1793.

inns and licensed houses, act,

**CH. 206.** to "bear true faith and allegiance to the Commonwealth of Massachusetts," to defend its constitution &c. The insurrection of 1786 gave rise to this oath. This act, on certain penalties, obliges innholders always to have suitable provisions and accommodations &c. Sect. 4 forbids all but licensed common victuallers, taverners, or innholders, to sell any strong liquors, or any mixed liquors, 'part spirituous, to be drank in their houses or appendencies, on certain penalties. And "if any person, licensed to sell wine, beer, ale, cider, brandy, rum, or any strong liquors by retail only, shall be convicted of entertaining, or suffering any person or persons to drink such strong liquors or mixed liquors, in their shops, houses, or parts or dependencies of such shops or houses," he incurs the penalties inflicted for selling without license. Sect. 5 forbids gaming and all implements for gaming in these licensed places as above. Sect. 6 forbids all dancing and revelling in licensed taverns, and punishes the innholder and persons dancing by small fines. Sect. 7 forbids innholders to allow persons to drink to excess in his house, or to allow minors or servants to set drinking there, or to have drink there without special allowance of their masters, parents, or guardians;—penalty 20s. Sect. 8 punishes the second offence against this act more severely, by surety of good behaviour; third breach of the act is forfeiture of license and inability to be licensed for three years. Sect. 9 provides corporal punishment in case of non-payment of fine and costs, on second breach of the act &c.

**Art. 3.**

Indictment for keeping a disorderly house, Cro. C. C. 523, 524; for using false dice, 2 Wentw. 391. —Justices of the peace are not liable for refusing &c. a license to keep an inn, 3 Wils. 123, 124.

Act of Feb. 21, 1820, lays a tax \$4 each.

Mr. Toulmin's State law in Virginia, inflicting a penalty on each tavern-keeper who demands and takes more for drink, diet, lodging, provender, stableage, or pasture, than is allowed by court. Same in Kentucky statute, Dec. 16, 1793.

§ 2. Sect. 10 directs these licensed persons to recognize to the State to keep good order in their houses &c. and to suffer no gaming or disorders there. Clerk to give bonds to account.

§ 3. Sect. 16 and 17 of this act are calculated to expose and punish with disgrace, certain intemperate or idle persons; and therefore empower the Selectmen, and make it their duty, to post up "in the houses and shops of all taverners, innholders, and retailers" in their town, "a list of the names of all persons reputed common drunkards, or common tiplers, or common gamesters, mispending their time and estate in such houses;" and every keeper of such house &c. after notice given him thus, who entertains one of these posted persons, or allows him to drink or tipple, or game in his house, &c. or sells him spirituous liquor, forfeits 30s.

§ 4. And if any person "by idleness, or excessive drinking of spirituous liquors, so mispend, waste, or lessen his or her estate, as thereby either to expose himself or herself, his or her family to want, or indigent circumstances, or the town to which he or she belongs, to a charge or expense for the

maintenance or support of him or her, or his or her family, or shall so indulge himself or herself in the use of spirituous liquors, as thereby greatly to injure his or her health, or endanger the loss thereof," then the Selectmen shall, in writing under their hands, forbid all licensed persons in their town, to sell to such any spirituous liquors, mentioned in the act, for one year ; and shall also forbid, in like manner, the licensed persons in a town to which such person may resort for the same : and if he or she do not reform during the year, in the opinion of the Selectmen, they may renew this prohibition ; and each licensed person forfeits 20s. for selling to such person, during such prohibition, any spirituous liquors mentioned in the act.

CH. 206.  
Art. 4.

§ 5. By this act, which provides for the erection of work-houses in each town, "for the reception and employment of the idle and indigent," and for the regulation and government of them by overseers, certain idle persons may be employed in them, to wit, "such as are all poor and indigent persons ; all maintained by, or receiving alms from the town ; also, all persons able of body to work, and have not estate or means otherwise to maintain themselves, and who refuse or neglect so to do, live a dissolute, vagrant life, and exercise no ordinary calling or lawful business sufficient to gain an honest livelihood ; and all such as having some ratable estate, but not sufficient to qualify them to vote in town affairs, do neglect the due care and improvement thereof ; and such as spend their time and property in public houses to the neglect of their proper business, or by otherwise mispending what they earn, to the impoverishment of themselves and their families, are likely to become chargeable to the town or to the Commonwealth. Johnson, an innholder, was adjudged indictable for selling oats at a rate exceeding 20d. a bushel, on 13 Rich. II. and 4 Hen. IV. c. 4. 20d. at the time being the common price. No statutes here to this purpose.

Mass. Act,  
Jan. 18, 1789.  
—Maine Act,  
ch. 124.

#### ART. 4. *Idle persons.*

§ 1. According to the best English law-writers, idleness is an offence against public police and economy. By the old Colony laws of Massachusetts and Connecticut, any person who spent his time idly or unprofitably was liable to be punished. "In China it is a maxim; that if there be a man who does not work, or a woman that is idle in the empire, somebody must suffer cold or hunger." The court of Areopagus at Athens, punished idleness, and examined every citizen if it thought proper as to the manner of his spending his time. The exercise of this power had a salutary tendency to influence the citizens to engage and always to employ themselves in useful and lawful occupations, and to avoid attempts to live by un-

Cro. Jam.  
609, John-  
son's case.

4 Bl. Com.  
169. Good act  
in Kentucky  
against idle  
persons, va-  
grants, &c.  
Dec. 15,  
1795, a full  
description  
of vagrants  
&c., and  
against beg-  
ging &c.



CH. 206. lawful practices.—The civil law expelled all sturdy vagrants from the city. And the laws of England punish idle and disorderly persons with imprisonment in the house of correction; rogues and vagabonds with that and whipping.

Art. 4.

Mass. Act,  
March 28,  
1788.—  
Maine Act,  
ch. 124.—  
Maine Act,  
ch. 111.—  
Mass. Act,  
June 23,  
1802.

§ 2. Our laws punish idle persons in the manner stated in the next preceding article; and by this act, which provides “for suppressing and punishing of rogues, vagabonds, common beggars, and other idle, disorderly, and lewd persons,” justices of the peace and sessions may send to the house of correction, “all rogues, vagabonds, and idle persons going about in any town or place in the county, begging, or persons using any subtle craft, juggling, or unlawful games or plays, or feigning themselves to have knowledge in physiognomy, palmistry, or pretending that they can tell destinies or fortunes, or discover where lost or stolen goods may be found; common pipers, fiddlers, runaways, stubborn servants or children, common drunkards, common night walkers, pilferers, wanton and lascivious persons in speech, conduct or behaviour; common railers or brawlers, such as neglect their calling or employment, mispend what they earn, and do not provide for themselves or the support of their families.” By this law all these descriptions are considered as public offenders, and when convicted of being of any of these numerous descriptions of offenders, they may be punished by imprisonment in this house of correction; and if there they are disorderly, the master of the house may put upon them shackles or fetters. These laws respecting these idle and vicious persons are almost as old as the country, and are perhaps, as full to some purposes as they can be; but they have usually been executed in a mild and moderate manner,—with great tenderness generally, in some cases perhaps too great. Perhaps it is best they should be cautiously executed;—certainly with prudence and a careful attention to facts, or otherwise no very inconsiderable number of persons might be at all times in the work-houses and houses of corrections, or posted in licensed houses. One half of the benefit of such laws is the just and well founded terror they excite, and the good influence they produce in deterring persons from becoming persons of the above description; and clearly there must be a sufficient execution of them to keep alive this fear. On the whole, it is questionable if this fear is sufficiently kept alive.

Doct. & Stud.  
16.

§ 3. By 34 Ed. III. no man under pain of imprisonment could give any alms to any valiant beggars able to labour, to the end they might be compelled to labour for their living. This was deemed a good law, and according to the intent of the law of God and revelation.

§ 4. The French Penal Code too merits attention, which

enacts, that vagrancy is an offence, art. 269. Art. 270, "those are styled vagrants or vagabonds who have no settled domicile, nor means of subsistence, and who do not habitually exercise a trade or profession;" and art. 271, are liable to imprisonment and to be at the disposal of the government after adjudged such; art. 272, if aliens may be sent out of France. Art. 273, but one may be bailed by a solvent citizen &c. Art. 274, to 282, punishes *sturdy* beggars, and regulates and restrains other begging.

CH. 206.  
Art. 5.

ART 5. *Play-houses.*

§ 1. In this description may be included stage-plays, theatres, stages for rope-dancers, mountebanks, &c. Some law-writers rank these, as well as inns and alehouses, among nuisances; but it may be doubted if they are properly nuisances,

§ 2. Tumbling is not within the meaning of the words, and *other entertainments of the stage*, which words followed inter-lude, tragedy, comedy, opera, play, and farce.

6 D. & E.  
286.

§ 3. This act provides, that if any person erect any house or building "for the purpose of having the same used or improved for acting, or carrying on any stage-play, interlude, or other theatrical entertainment, in any county in this Commonwealth, without the license" of the sessions, obtained on the approbation of the selectmen, he forfeits not exceeding \$200 for each offence, to be recovered on indictment in the Supreme Judicial Court to the use of the State.

Mass. Act,  
March 12,  
1806.

§ 4. Section 2 in like manner restrains the letting for gain, hire, or profit, any house or building, or allowing any house or building in his possession to be used for profit for said purposes, without such license and approbation, on penalty of a sum not exceeding \$500, "for each and every time" such house &c. is let to hire or suffered to be so used, to be recovered on indictment in the Supreme Judicial Court, to the use of the State.

§ 5. Section 3 provides, that if any person, "act or carry on, or assist in acting or carrying on, for profit, gain, or valuable consideration, any stage-play, interlude, or other theatrical entertainment, in any house or building or other place," without such license so obtained, he forfeits not exceeding \$400 to said use and to be so recovered.

§ 6. Section 4 provides, that such licenses continue in force one year only, but may be annually renewed on such approbation.

§ 7. The legislature in passing this act recited, "that many and great mischiefs arose from public stage-plays, interludes, and other theatrical entertainments, which not only occasioned great and unnecessary expenses and discouraged industry and frugality; but likewise tended generally to increase immorali-

Mass. Act.  
March 1750.

CH. 206.

Art. 6.

2 Stra. 1120,  
Rex v. Crofts.

ty, impiety, and contempt of religion :” and then enacted penalties for doing or performing any of the matters and things specified in said act of March 13, 1806 ;—penalties, half to the government and half to the informer,—and also might be recovered on indictments, &c. This law was absolute and made no provision for any licenses—was continued to Nov. 1, 1785, and then expired. There had been like laws in force previously to passing this act. Except from 1785 to 1806, play-houses and stage-plays have always been prohibited in Massachusetts, or allowed only by licenses, as above. The laws of New England have always been more opposed to them than those of other parts of united America. A *feme covert* convicted for selling gin contrary to law, on the principle she can act independently in managing bad houses, &c.

ART. 6. *Luxury.* Luxury in every State is closely allied to gaming, plays, intemperance, and other matters considered in this chapter. This also is viewed as an offence against public economy, and usually consists in extravagant expenses, in dress, furniture, carriages, diet, liquors, &c. &c. and sometimes in building. The evil is always seen by all men of discernment to exist in a greater or less degree in every State. It is an evil that has strong passions to support it, as pride, love of show, parade, and distinction, often a spirit of rivalry, and frequently appetite; an evil that brings many to want and poverty, to insolvencies and bankruptcies, and not a few to our poor-houses to be a burden to others; and if not a burden to others thus directly, great numbers become incapable of bearing any part, or any considerable part of the public burdens, by means of wasting in luxury and debauched living their property, and many also often become even incapable of business by means of luxury or of intemperate and wasteful living. The evils of luxury that reduces to poverty and want, to insolvencies and bankruptcies, to a loss of health and strength, are admitted and lamented by all thinking men; but there is a sort of luxury, a sort of large expense in living, about which there has been and probably ever will be much controversy. Some contend it is useful in monarchies, and some few even in republics, in order to scatter and diffuse the wealth of the rich, which otherwise would too much accumulate; this is viewing luxury in the most favourable light; for it rarely confines itself to scattering this surplus wealth, but it often wastes a mere competency and the poor man’s dollar. Still, however great the evil is in our country, it is a serious question if any sumptuary laws (more than we have) can be enacted to any useful purpose to prevent or lessen luxury. The remedy must in general be in the public opinion and in the manners of the people. There are now in the United

States, properly speaking, no sumptuary laws against luxury in the usual acceptation of the word. Such laws were once tried in England to a great extent, especially in the reigns of Edward the Third, of Edward the Fourth, and of Henry the Eighth, against piked shoes, short doublets, and long coats, all of which were repealed by statute of 1 James I. c. 25. But as to excess in diet there remains in force one ancient statute, 10 E. III. st. 3, in England.

CH. 206.  
Art. 7.

And in the early settlements of our Colonies, our ancestors passed sumptuary laws in imitation of those in England, not so much however to restrain real expences, and waste of estates, as to restrain fashions, especially in dress, odious to the puritanic sentiments of the times; of the kind were their laws punishing bare arms, and long hair, &c. some kinds of dresses showy but not expensive, &c.

Colony  
Laws.

ART. 7. *Federal District, retailing in &c.; see District of Columbia &c.*

§ 1. The deft. was indicted for selling spirituous liquors within the town of Springfield. It appeared on the trial that this was done in the *Federal district* in that town, that is, the offence was committed upon lands which had been purchased by the United States, for the purpose of erecting arsenals &c. to which the consent of the Commonwealth was granted, by the statute of 1798, c. 13. Held, the court of the Commonwealth cannot take cognizance of offences so committed. This was a very important decision; for there are many of these districts in the United States. The decision depended on this article in the constitution of the United States, to wit, art. 1, s. 8, by which Congress has jurisdiction "over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful purposes;" and also upon these lands which had been so purchased before the offence complained of, for and by the United States, by such consent of the State. This consent of the State, like every other, had this condition, to wit, that civil and criminal process of the State might be served therein by the officers of the State. This was to prevent these places becoming a sanctuary for debtors and criminals. And, said the court, also, these officers, in executing process in these places, "act under the authority of the United States:" and "no offences committed within that territory are committed against the laws of the Commonwealth." Also held, the inhabitants of this territory, about 640 acres, "cannot exercise any civil or political privileges, under the laws of Massachusetts, within the town of Springfield;" nor are they bound "to pay any taxes imposed by" the authority of the State, "nor bound by any of its laws."

8 Mass. R. 72  
77, Commonwealth v. Clary.

CH. 206. On the whole it was held, the Federal jurisdiction was exclusive.  
*Art. 7.*

§ 2. A State statute gave power to commissioners to resell lands, (in Washington city,) on the first buyer's failing &c. *6 Cranch, 53, Oneale v. Thornton.* Held, they could resell but once; and by selling a third time they precluded themselves setting up the second sale; and the second purchaser, by making this defence, confirmed the third purchaser's bargain.

§ 3. As to the offences and laws, stated in this chapter, it is to be observed that the judicial proceedings are so few, to be found, and of such a nature, that the law on each subject is not to be learnt from them in any considerable degree, but mainly from the statutes themselves; therefore it has been necessary to cite them more at large than in most other cases, as almost the only way to shew what the law is, in relation to licensed houses and places, idle, poor, and vicious persons, games and plays, work-houses, houses of correction, and the descriptions of persons punishable in them, luxuries, &c. mentioned in this chapter. And though these kinds of laws do not often give rise to important judicial decisions, yet they are very interesting, as they respect the morals, the economy, and good order of society, and therefore to be read and carefully attended to by all. So very often the meaning of the law on a subject best appears, and this most concisely, in citing the essential parts of the indictment or declaration; for usually more accuracy and more attention have been bestowed on settled forms in pleadings than on any other parts of the law. The laws, too, abridged or cited in this and some preceding chapters, in criminal matters, ought not to be omitted, because they shew clearly the attention that has been paid to the morals and good order of the people; and many of these laws are in substance those of other States, all being derived mainly from the same source, the English code. As every well governed state must have such laws, and as they constantly affect the mass of the people, and their daily concerns, they are of more importance than is generally imagined. These remarks apply to the laws stated in several other chapters, in which statutes enacted for the punishment of offences are cited or abridged. Also it is in conformity to the plan of this work, to include in it a material portion of American law on every subject.

## CHAPTER CCVII.

## LIBELS.

ART. 1. *General principles.*

§ 1. Libels have been considered already somewhat at large, in Ch. 63, in which civil actions for defamation and libels were treated of. In that chapter a libel was defined, and the nature of it described. It was also then stated, that if one print and publish a libel, he may be not only sued in a civil action for damages, by the party injured, but also may be indicted, because every libel has a tendency to a breach of the peace, and to provoke others to break it; which offence, *criminaliter*, is the same, whether the matter in the libel be true or false. And whether a libel or not, is a question of law. And many other essential matters as to libels, were in that chapter considered—as what amounts to a libel; what to a publication of it; what is not a libel, or a publication, &c. It then remains only to consider briefly libels as indictable offences against the public peace. It is often difficult in a free country to draw the true line between a libel indictable and a publication to be allowed as a fair investigation of public measures, and of the characters of public men. Without free investigation on the one hand, by means of the press, liberty cannot be preserved; nor can it, or government, be secured on the other, if every character and public measure is to be maliciously misrepresented, by means of publications from the press. The sound principles of common and good sense, candor, and enlightened moderation, must draw this line of distinction. The falsehood of a libel is material; its pernicious tendency is more so. For even a libel that is true may be so written and conducted as to produce a vast deal of public mischief, and no public good at all; the manner therefore in conducting a libel or publication, is very essential, as well as the matter. From this manner then a libel, true in fact, may have a great and pernicious tendency to excite animosities in the State, and to disturb the public peace. The freedom of the press is well preserved whenever the party is allowed to publish *the truth*, with candor and fairness, and in a manner shewing his object is the public good, and not to vilify character, or to make a measure odious, merely because not adopted by his party, or by particular men. All agree that the freedom of the press is to be preserved, and that the

CH. 207. *licentiousness* of it is to be punished; the question of difficulty then is, when is it used in a licentious manner or not?

Art. 1.

This question will ever depend materially on the character of the publication, and circumstances of the particular case, as tried and examined on the grounds of our common law.

§ 2. Our law of libel seems to have existed time out of mind; and to have been mentioned as having had distinct existence, but however as a part of the common law, and as a peculiar and important branch of it. It does not forbid a simple act, as the law prohibits an assault, or a larceny; but the law of libel aims to prevent wrong in the principle; for an injury by libel involves in it such a vast variety of circumstances that it is indefinable. The same act, in one state of things, may be innocent, as when done by accident or mistake, without malice or evil intent; and in another state of things it may be criminal, as where it is done intending to injure.

1 D. & E. 751.  
—Hob. 253.  
—11 Mod. 99,  
&c. &c.; but  
Stra. 898.—  
Holt on Li-  
bels, 280, 281.

§ 3. As injuries by libel are infinitely various, so are the wrongs and offences caused by it. The libeller may say his libel is true, as it respects damages to the individuals affected by it; but not as it respects the public, at common law, because a libel that is true tends as much to disturb the peace of society, and to produce public evil, as a libel which is false, and often more. But statutes and State constitutions have allowed the truth to be given in evidence, even in criminal suits, as in the United States sedition act of 1798; as in New York, New Jersey, Ohio, Kentucky, &c. This may be very right where the truth is honestly told, and with good intentions; but beyond all doubt, the truth may be, and often is, told maliciously, and with an evil intent; and the truth, maliciously told, and especially printed and published, may be no better than falsehood. The common law, solely to preserve the public peace, punishes a libel that is true.

§ 4. He who libels another, accuses, tries, and punishes him, and unheard. Here a violation of the soundest principle is added to personal injury.

Ld. Raym.  
418.

§ 5. In the mildest state of the Roman law, libels against the state were severely punished. The same was the case at Athens. And Lord Holt observed, that “libelling against a private man, is a moral offence; but when against the government it tends to the destruction of it.” “This notion of libelling is as old as the common law.” And Lord Mansfield, speaking of the liberty of the press &c., said, “to be free is to live under a government by law;—the liberty of the press consists in printing without any previous license, subject to the consequences of law;—the licentiousness of the press is Pandora’s box, the source of every evil.”

§ 6. Lord Camden, speaking of libels, said, "all governments must set their faces against them;" "and if juries do not prevent them, they may prove fatal to liberty, destroy government, and introduce anarchy." The truth told with honest and fair intentions is never a libel, except where it tends to provoke a breach of the peace, and on this account only is the libel publicly prosecuted. Hamilton, whose opinion was approved, said, "the liberty of the press consists in the right to publish, with impunity, truth with good motives and for justifiable ends, whether it respect government, magistracy, or individuals." A piece written with good motives, and on a proper occasion, rarely provokes a breach of the peace, or tends to it.

CH. 207.

Art. 2.

2 Wils. 292.

§ 7. In fact every writing which is understood to impute to one scandal, reproach, and ridicule, is a libel, though the language may be disguised; for the law is not to be evaded or defrauded by scandalizing, ridiculing, or debasing a person, in a mysterious manner. So writing ironically may be a libel.

11 Mod. 86,  
Queen v.  
Brown.—  
Hob. 215.—2  
Roll. R. 345.

§ 8. This code goes a little further, as to slander and calumny, than our common law, and perhaps very properly, as this code punishes any act, which, if true, would expose the person to correctional punishment, or merely to the contempt or hatred of his fellow citizens. But if the charge or imputation made against a person, be legally proved, its author shall not be subject to punishment; but legal proof is only such as results from a judgment, or other authentic acts, or instrument in writing.

The French  
Penal Code,  
art. 367, 378.

#### ART. 2. *Indictment for libels.*

§ 1. In Ch. 63, several cases of indictments and informations were stated, as *Rex v. Woodfall, v. Paine, v. Benfield, v. Waite, v. Topsham, v. Woolston, v. Watson, v. Alme & al., v. Horne*; also *Commonwealth v. Clap*, and *v. Carlton*. Evidence must prove the substance of the libel as laid.

See Con-  
tempt, ch.  
220—M'Nal-  
ly, 352, 357.  
—1 Stra. 416.  
—2 Saund.  
121.

#### § 2. *Indictments for libels supported or not.*

An indictment for a libel may be supported, if the meaning be clear to the jury, though facts may be mistaken, or letters in words be omitted. Tenor means a true copy as to words written, not as to words spoken. See Ch. 63, a. 6, &c.; and *Cro. El. 224, 503*; *2 Salk. 660, 663*.

Lofft, 780.—  
5 Co. 53, 125.  
—M'Nally,  
352—8Co.78.

§ 3. In this case, Mary Jerome, a Quaker, less rigid than her brethren, according to their usual discipline, was first admonished for frequenting balls and concerts; then they sent deputies to her, and lastly expelled her; and entered for a reason, in their books, "for not practising the duty of self-denial;" this was signed by the deft., Hart, their clerk. On her request he sent her a copy; this was his only act of publication proved. For this he was indicted, and found guilty.

1 W. Bl. 386,  
The King v.  
Hart.—4  
Wentw. 199  
to 212.—Cro.  
C. C. 462 to  
465.—Stra.  
636.—1 Burr.  
516.—Hob.  
216.



CH. 207. New trial was granted ; for this was not a libel indictable ;  
*Art. 2.* the deft's. entry was according to the usage of his office and society, and he made no publication but at her request.

8 D. & E. 293,  
 Rex v. Wright.  
 --Indictments  
 & informa-  
 tions for sun-  
 dry libels,  
 see Ch. 218,  
 219.—  
 Holt on  
 Libels, 171.  
 1 Dall. 319.

§ 4. In this case a report of a committee of the House of Commons was made, that reflected on the character of an individual, J. Horne Tooke, and accepted by the house. The deft. published a true copy of a paragraph of this report, though not authorized to do it. The paragraph complained of, and under the title, "attempts to assemble a convention of the people of England," was as follows: "Some of the persons so arrested were prosecuted for high treason. A grand jury, for the county of Middlesex, found a bill against Thomas Hardy, the secretary of the London Corresponding Society, and eleven others; three of the persons so indicted, namely, Thomas Hardy, John Horne Tooke, and John Thelwall, were tried, and on their trials were acquitted of the charge in the indictment. But the evidence given on those trials established, in the clearest manner, the grounds on which the committees of the two Houses of Parliament had formed their report in 1794; and shewed, beyond a possibility of doubt, that the views of these persons and their confederates were, in their nature, completely hostile to the existing government and constitution of the kingdom, and went directly to the subversion of every established and legitimate authority." The House entered this report on their journal, and ordered as many printed copies as were wanted for the use of the members.

Held, this is no foundation for an information or an indictment against the deft. for publishing a libel; for it is impossible to admit the proceedings of either branch of the legislature is a libel; then it cannot be the foundation of a *criminal* proceeding. In *Rex v. Williams*, the paper published and relied on, was that of an individual; "but this is a proceeding of one branch of the legislature, and therefore we cannot inquire into it." "It is a proceeding of those who, by the constitution, are the guardians of the liberties of the subject; and we cannot say any part of that proceeding is a libel;" per Lord Kenyon. The court, in this, went on the ground that as this act of a branch of the legislature could not, as such, be a libel, the deft. could not be guilty of a libel for publishing a true copy of it, though he did it without authority from that branch: but otherwise perhaps had he not published a true copy. And the court thought it was every day's practice for individuals, of their own accord, to publish the true proceedings of the courts of justice, though they reflected on individuals; and that such publications, truly made, are for the public good, and more than balance the inconven-

ence to the individuals concerned. Though the members of a legislature may, in speaking therein, reflect on individuals, they have no right to publish such speeches. Holt on Libels, 201 &c.

CH. 207.  
Art. 3.

§ 5. But it is a libel, if A delivers a writing to a parson to be published in a church, which says, *bewail the sodomy and wickedness in this city, which go unpunished by the magistrate*, though it does not say, the magistrate knew it. So to write to one, accusing him of cheating, is a libel,—or of swindling.

1 Sid. 219,  
271—5 Mod.  
43.—2 Salk.  
698.—Raym.  
201.—1 D. &  
E. 748.—

§ 6. A man is not indictable for a libel if he do not contrive it, nor procure it to be composed, nor publish it knowing it to be a libel. An obscene book is punishable as a libel. So for sending Lord Halifax a license to keep a public house, a person of his dignity. But not a writing that inveighs against mankind in general, or against a particular order of men; to be a libel, it must descend to particulars, and individuals. 1 Lord Raym. 486. And see *Jones v. Randall*. But not a libel to publish a true account of the proceedings of a court of justice, however injurious to the character of an individual as respects a civil action. *Rex v. Wright*. But is a libel to publish a highly coloured account of judicial proceedings, mixed with the party's own observations and conclusions on the court's doings, containing an insinuation that the plt. had committed perjury. Holt on Libels, 168 to 176.

9 Co. 69.—2  
Stra. 789.—  
1 Stra. 422 —  
3 Salk. 224,  
*Rex v. Orme*.  
—1 Bos. &  
P. 325, *Curry*  
*v. Walter*.—  
7 East, 493,  
*Stiles v.*  
*Nokes*.—7  
*Johns. R.*  
264.

#### ART. 3. Evidence.

§ 1. The whole libel need not be stated in the indictment; but if any part of it qualifies the rest, this part may be given in evidence. The essence of a libel consists in the writing. It is also criminal to copy a libel.

1 Ld. Raym.  
414, *The*  
*King v.*  
*Bear*.

§ 2. In an indictment for a libel the offence need not be charged as having been committed *vi et armis*,—nor that the libellous matter is false,—nor previous good character.

7 D. & E. 4,  
*Rex v. Burke*.  
—Holt, 253.

§ 3. Hall was prosecuted for a libel against the *doctrine of the Trinity*. A witness testified it was shewn to the deft. "who owned himself the author of that book, errors of the press and some small variations excepted." Held, this confession entitled the Attorney General to read the book, though the confession was not absolute. And it was enough to put the deft. to shew there were material variances.

Stra. 416,  
*Rex v. Hall*.  
See Ch. 198,  
a. 8, s. 17.—  
Holt on Li-  
bels, 169,  
176, 287,  
307.

§ 4. In point of law, the purchasing the pamphlet (libel indicted) in the public open shop of a known professed bookseller and publisher of pamphlets, of a person acting in the shop, *prima facie*, is evidence of a publication by the master himself; but that is liable to be contradicted where the fact will bear it, by contrary evidence, tending to exculpate him, and to shew he was not privy or assenting to it, or encouraging it. But the deft. offered no evidence to repel this presumption.

5 Burr. 2686,  
*Rex v. Al-*  
*mon*.—3 Ld.  
Raym. 18, 49.  
—Poph. 135.  
—3 Taun.  
466.—3 Lev.  
138.

CH. 207. § 5. In this case the deft. was indicted for a libel. Two important questions were made in it in the Supreme Court in New York: 1. Can the deft. give the truth in evidence, in

*Art. 4.*

3 Johns. Cas. 337, *The People v. Crosswell*.—Same case, Holt on Libels, 178.—1 Caines' R. 480, 518.—1 Binney, 601.—6 Binney, 340.

justification? 2. Are the jury to decide both on the law and the fact? Neither, it is understood, is a question in this State. Here the truth cannot be given in evidence in justification. See Ch. 63. And the jury must decide both on the law and the fact, when both are involved in the general issue, on which they find their verdict. For other cases of evidence on libels &c. see Ch. 63, and chapters as to evidence, sundry places. In what sense the jury decide the law, see in Chase's case, Ch. 222.

3 Johns. Cas. 198, *Riggs v. Denuiston*.

§ 6. Is a libel to charge a counsellor at law with offering himself a witness, in order to disclose the secrets of his client: so one, as a commissioner of bankruptcy, with wilfully perverting the law, and oppression.

ART. 4. *Pleadings in cases of indictments &c. for libels &c.* See Ch. 63.

Lofft, 544.—1 Maule & Sel. 280.

§ 1. It is no excuse or plea, that the publisher of a libel is ignorant of its contents; nor is it any plea or justification for publishing a libel, that the publisher is in custody.

Lofft, 759, *Rex v. Williams*.

§ 2. But the publisher's being ignorant of its contents may be in mitigation of the punishment, though it cannot give him any plea of justification.

2 Wils. 151, *Rex v. Wilkes*.—M'Nally, 443, 449.—2 New R. 357.—6 East, 404.—Holt on Libels, 278, 286.

§ 3. An important principle was settled in this case; that is, if a man be arrested on a warrant for being the author of a libel, he may plead his privilege of exemption from arrest in such case, (as privilege of parliament) by which he is exempted from arrests in all cases, except for treason, felony, and actual breach of the peace, and on the ground, if the author of the libel, it is only a misdemeanor, and not a breach of the peace, or any of said three crimes. It must be an *actual* breach of the peace that makes the privilege of no avail, and though a libel *tends* to a breach of the peace, it is clear it is not an *actual* breach of it. And upon the same principle, if surety of the peace is required of a libeller, he may plead his privilege as an exemption from finding such surety, if such privileged person.

ART. 5. *Mail.*

Act of Congress, April 30, 1810.

§ 1. Robbing the mail &c. is by the 19th sect. of this act, punished by imprisonment &c. This sect. enacts, "if any person shall rob any carrier of the mail of the United States, or other person intrusted therewith, of such mail or of part thereof," the offender shall be imprisoned not exceeding ten years; on second conviction, death. "Or if in effecting such robbery of the mail the first time, the offender shall wound the person having the custody thereof, or put his life in

jeopardy, by the use of dangerous weapons, such offender or offenders shall suffer death." And if any one attempt to rob the mail, "by assaulting the person having the custody thereof, shooting at him or his horse or mule, or threatening him with dangerous weapons, and the robbery is not effected," the offender shall be punished by imprisonment, not above three years. "And if any person shall steal the mail, or shall steal or take from, or out of any mail, or from or out of any post-office, any letter or packet, or if any person shall take the mail, or any letter or packet therefrom, or from any post-office, whether with or without the consent of the person having custody thereof, and shall open, embezzle, or destroy any such mail, letter, or packet, the same containing any article of value, or evidence of any debt, due, demand, right, or claim, or any release, receipt, acquittance, or discharge, or any other article, paper, or thing mentioned and described in the 18th sect. of this act; or if any person shall by fraud or deception, obtain from any person, having custody thereof, any mail, letter, or packet, containing any article of value or evidence thereof, or either of the writings referred to, or next above mentioned, such offender or offenders, on conviction thereof, shall be imprisoned not exceeding seven years." "And if any person shall take any letter or packet, not containing any article of value or evidence thereof, out of a post-office, or shall open any letter or packet which shall have been in any postoffice, or in the custody of a mail-carrier, before it shall have been delivered to the person to whom it is directed, with design to obstruct the correspondence, to pry into another's business or secrets, or shall secrete, embezzle, or destroy any such mail, letter, or packet, such offender, on conviction, shall pay for every such offence, a sum not exceeding \$500."

CH. 207.

Art. 5.

§ 2. Sect. 20 enacts, "if any person shall rip, cut, tear, burn, or otherwise injure any portmanteau, valise, or other bag used or designed to be used by any person acting under the authority of the postmaster general, or any person in whom his powers are vested, in the conveyance of any mail, letter, packet, newspaper, or pamphlet, or shall draw or break any staple, or loose any part of any lock, chain, or strap, attached or belonging to any such valise, portmanteau, or bag, with intent to rob or steal any mail, letter, packet, newspaper, or pamphlet, or to render either of the same insecure," every offender, for each offence, forfeits not above \$500, or be imprisoned not above three years.

§ 3. Sect. 18 enacts, if any one employed in the post-office "shall unlawfully detain, delay, or open any letter, packet, bag, or mail of letters, with which he shall be intrusted,

CH. 207. or which shall have come to his possession, and which are  
*Art. 5.* intended to be conveyed by post, or if any such person shall  
 secrete, embezzle, or destroy any letter or packet intrusted  
 to him as aforesaid, and which shall not contain any security  
 for or assurance relating to money as herein after described,"  
 the offender for each offence shall be fined not above \$300,  
 or imprisoned not above six months, or both: "And if any  
 person employed as aforesaid, shall secrete, embezzle, or  
 destroy any letter, packet, bag, or mail of letters with which  
 he shall be intrusted, or which shall have come to his posses-  
 sion, and are intended to be conveyed by post, containing any  
 bank note or bank post-bill, bill of exchange, warrant of the  
 treasury of the United States, note of assignment of stock in  
 the funds, letters of attorney for receiving annuities or dividends,  
 or for selling stock in the funds, or for receiving the interest there-  
 of, or any letter of credit, or note for or relating to payment of  
 monies, or any bond or warrant, draft, bill, or promissory note,  
 covenant, contract, or agreement whatsoever for or relating to  
 the payment of money, or the delivery of any article of value,  
 or the performance of any act, matter, or thing, or any receipt,  
 release, acquittance, or discharge of or from any debt, cove-  
 nant, or demand, or any part thereof, or any copy of any  
 record of any judgment or decree in any court of law or  
 chancery, or any execution which may have issued thereon,  
 or any copy of any other record, or any other article of value,  
 or any writing representing the same; or if any such person  
 employed as aforesaid, shall steal or take any of the same out  
 of any letter, packet, bag, or mail of letters, that shall come to  
 his possession, he shall, on conviction for any such offence, be  
 imprisoned not exceeding ten years." This sect. also punishes  
 any mail-carrier for deserting the mail, and not delivering it  
 according to his duty, with fine, not exceeding \$500.

§ 4. Sect. 7 punishes every one for knowingly and wilfully  
 obstructing the mail, with fine not above \$100; each ferry-  
 man \$10 for every ten minutes' delay,—are several other  
 penalties in this act.

CHAPTER CCVIII.

NUSANCES.—BONFIRES, PAGEANT SHOWS, &c.

ART. 1. § 1. Nusances are of various kinds, as bonfires, fire-works, squibs, &c. bridges out of repair, eavesdroppers, fish-acts obstructed, ferries negligently kept, highways out of repair, horse-racing, lotteries, offensive trades, unwholesome provisions. See the ancient writs of nuisance, Bohun, 43 to 55.

Act of Maine for the prevention and removal of nusances, Ch. 211. See the writ *quod permittat*, Bohun, 56, 61; F. N. B. 125.

§ 2. These are all against the public police and economy, and deserve the constant attention of legislators, and of those who execute the laws. This, as already observed, is a very important and extensive branch of the law; for, strictly, whatever annoys or damages another, or the public, is a nuisance, and may be removed by the party aggrieved, in a peaceable manner. Nusances are *private* or *public*. Private nusances (and with them, in some measure, public ones,) have been already considered in Ch. 74 &c.; there the nature of nusances in the air, to houses, by overhanging, stopping lights, and corrupting the air. Nusances to lands, to incorporeal hereditaments, by unwholesome trades, &c. &c. were largely considered as the grounds of civil actions, and as private injuries; and the substances of most of the statutes relating to nusances were cited. Hence little more remains to be done in this chapter than to attend to the public offences, and the indictments for, and the punishments of them, when the State is prosecutor. Indictment for placing carrion near the highway, 4 Wentw. 215, 219. Indictments, &c. 4 Wentw. 213 to 227. Cro. C. C. 519 to 559.—Against a butcher for using his slaughter-house in a public market, Cro. C. C. 519.

ART. 2. *Bonfires, crackers, fire-works, squibs, rockets, pageant shews, &c. setting fires to woods.*

Section 8 enacts, if any person "ride with a naked scythe, on the highways, or through any lanes, streets, or alleys," forfeits \$2. Mass. Act, Mar. 10, 1797.

Section 9 enacts, "that if any three or more persons, being any or all of them armed with sticks, clubs, or any kind of weapons, or being in any manner disguised, shall assemble together, having any imagery or pageantry, as a public shew, in any of the streets or lanes, in any town or district in this Commonwealth; or if any person or persons of or belonging to any company, having any kind of imagery or pageantry for [Maine Act, ch. 125.]

**CH. 208.** a public shew, shall, by menaces or otherwise, exact, require, demand, or ask any money, or other thing of value, from any person in the streets, lanes, or houses, in any such town or district, every person being of, or assembled with, such company, shall for each offence forfeit and pay \$8, or be imprisoned not exceeding one month."

**Art. 3.**

Section 10 enacts, "that if any persons to the number of three or more, between sunset and sunrise, being assembled together in any of the streets or lanes in any town or district, shall have any kind of imagery or pageantry, for a public shew, although none of the company so assembled shall be armed or disguised, shall exact, demand, or ask any money, or other thing of value, every person being of such company shall forfeit and pay the sum of eight dollars, or be imprisoned not exceeding one month."

Section 11 enacts, "that if any person or persons shall set fire to any pile or combustible, or be any way concerned in causing or making a bonfire, in any street or lane, or any other part of any town or district, within this Commonwealth, such bonfire being within ten rods of such house or building," every person so offending forfeits \$8 for each offence, or to be imprisoned one month; half, in each of the four cases, to the town, and half to the informer; masters and parents to be liable for servants and children.

Mass. Act,  
Mar. 4, 1806.  
—Maine Acts,  
ch. 26, 126.

This act provides, that "if any person shall offer for sale, set fire to, or throw any lighted cracker, squib, rocket, or serpent," without license from the selectmen &c., he forfeits for each offence \$5, half to the town, and half to the informer.

Mass. Act,  
Mar. 10, 1797.

Section 7, of this act, provides, "that if any person or persons shall wittingly and willingly set fire to any woods or lands lying in common, or to woodland, or other land held in severalty, and not his own," without leave first obtained from the owners thereof, or those having a right to give leave, except where necessary to make back fires, to stop fires that may be spreading; the offender forfeits, for each offence, \$10, half to the State and half to the informer; and be liable in an action on the case, to parties injured by such fires; and parents and masters to be liable for their minors &c., unless employed by some stranger, then he to be liable for them. See act of Maine, to prevent damage by fire, and the safe keeping of gun-powder, Ch. 25; as to Fire-engines, Ch. 27.

**ART. 3. Bridges out of repair.** This subject considered, Ch. 79, a. 12. The indictment for not repairing, states the situation of the bridge, and a public highway, time out of mind &c., for all the citizens and inhabitants of the State, with their horses, teams, carts, and carriages, to go, pass, ride, and travel, at their pleasure; then that ——— on ———, and

yet it is in great decay, broken and ruinous, so that the said citizens and inhabitants, upon and over the bridge with their horses, teams, carts, and carriages, could not and cannot pass, ride, or travel, without great danger, and to the great damage and nuisance of all the citizens and inhabitants of the said C——, upon and over the same bridge going &c., and against the peace. The indictment must then state who is liable to repair the bridge, and how, &c. See 2 Ld. Raym. 1174; 1 Salk. 174; 6 East, 154; Ch. 79, a. 12, sundry cases.

CH. 208.

Art. 7.

ART. 4. *Eavesdroppers.*

They are a nuisance at common law, and may be punished by indictment at the sessions, and bound to their good behaviour. They are, in the English books, described as persons who listen under walls or windows, or the eaves of houses, to hearken after discourse, and thereupon to frame slanderous and mischievous tales. Such offenders exist in this and every State, though not always known by the name of eavesdropper. Nor is it perceived there are any words in the act of March 28, 1788, describing numerous offenders, (Ch. 206, a. 4,) which include these offenders, called, in England, *eavesdroppers*.

Haw. P. C.  
132.—4 Bl.  
Com. 169.

ART. 5. *Fish acts obstructed.*

These acts were attended to, Ch. 68, where considered as the grounds of civil actions. And the civil and criminal parts of the laws on this subject of the fisheries being much mingled together, the same were there considered at large, as the law of nations, acts of Congress, treaties, and the Colony, Province, and State statutes and decisions in Massachusetts applied, except numerous private and local acts, too many and varying to be attended to in a work of this kind. On some of these acts an indictment lies, as on the act of October 24, 1783, for taking fish out of season in Merrimac river, by a seine or drag-net.

ART. 6. *Ferries negligently kept.*

A ferry that is kept in a negligent and impassable manner, is a nuisance. The laws on this subject were sufficiently considered in Ch. 67, as a subject of civil actions &c.

ART. 7. *Highways out of repair.*

This matter was largely considered in Ch. 79, where it was found most convenient to bring the laws and decisions together on the subject. Our criminal proceedings as to them have been but few, and not important. Indictments for not repairing highways, see Cro. C. C. 524, 531.

*Fire-engines*—acts as to, see Mass. statutes, Feb. 7, 1786; Feb. 25, 1795; June 5, 1800; Feb. 8, 1803; March 8, 1806; Maine act, ch. 132; statute in Kentucky, Jan. 23,



CH. 280. 1798, for establishing fire companies in the several towns, the Virginia acts revised. These kind of laws are all usually on the same principle ; that is, they authorize a-number of men to organize and to regulate proceedings at fires in their respective districts, assigned by law, to make rules, the breach of which are punished by fines and penalties, recoverable by actions of debt or informations. Act for opening roads, December 25, 1797 ; by this, roads are opened under the appointments and directions of the county courts ; precincts are made, and surveyors and labourers are apportioned ;—made 30 feet wide, with bridges and causeways, &c. Another act, December 11, 1801.

ART. 8. *Horse-racing.*

Mass. Act,  
Mar. 8, 1803.

This act was passed “ for the prevention of horse-racing,” and enacts, that “ no plate, purse, sum of money, or other thing of value, shall be run for, by any horse, mare, or gelding ;” and then punishes every person any way concerned in horse-racing, for any plate, purse, &c. with a penalty not exceeding \$100, nor less than \$10, to be recovered by indictment &c. Before this act was passed, horse-racing seems to have been no otherwise forbidden than as being included in the general words, *unlawful game or gaming*.

ART. 9. *Lotteries.*

§ 1. These clearly are justly ranked among nuisances of the most deceitful and deluding kind ; they are calculated to give life and activity to a very pernicious passion, a fallacious hope of gain, without industry or a proper use of means ; a passion naturally too strong, under the best restraints of law, and truly pernicious wherever there is a field allowed by law for a gambling spirit.

§ 2. It is not recollected that Congress, under the new constitution, nor indeed since 1776, has granted more than one lottery. November 1, 1776, Congress resolved, “ that a sum of money be raised by way of lottery, for defraying the expenses of the next campaign.” This was at a time when every expedient possible was resorted to, to carry on the war without resorting to taxes. The plan was, to raise about \$1,500,000, by a deduction of 15 per cent. After being a subject of much trouble and expense for several years, it afforded no aid of any importance in the war.

The conduct of Massachusetts, in regard to lotteries, has usually been to view them as nuisances, and to pass general laws against them, on the one hand, and on the other to allow them, by special statutes, almost as often as asked for. In, or about, 1820, Congress granted a lottery for the benefit of the District of Columbia.

§ 3. A. D. 1719, the legislature of Massachusetts passed an act for the suppression of lotteries; recited there had been set up "certain mischievous and unlawful games, called lotteries," and declared these, "and all other lotteries," are "common and public nuisances;" and enacted severe penalties for setting them up, or managing them in any way.

CH. 208.  
Art. 10.

Mass. C. & P. Laws, 761, 766.—The act of Virginia is strict against Lotteries; forbids all granted out of the State.

§ 4. A. D. 1733, it appears such was this gambling spirit, that men exposed their estates to sale by lotteries, and as the legislature then declared, "to the great discouragement of trade and industry, and grievous hurt and damage of many unwary people;" and then more severe penalties were enacted to punish all persons in any way concerned in lotteries.

§ 5. By this act of 1785, the above acts, of a prior date, were revised and re-enacted; and also inflicted a penalty of £20 on every person who received or purchased a lottery ticket; but lotteries allowed by any State legislature, or by Congress, were excepted.

Mass. Act, Nov. 8, 1785.  
—Maine Act, ch. 28.

§ 6. The very next year our legislature established a great lottery for the sale of fifty townships of Eastern lands, and to bring into the treasury £163,200 in public securities by such sale; and almost ever since our newspapers have been filled with lottery schemes allowed by State legislatures, most of which have at times declared all lotteries "common and public nuisances."

Mass. Act, Nov. 9, 1786.

ART. 10. *Offensive trades.*

§ 1. There is no doubt but that many trades are noxious and to be considered as nuisances; perhaps some are such at common law. And if any be such in our Federal districts and territories they must be such by this law, as we have no acts of Congress on the subject.

§ 2. In this State as there long have been statutes designating noxious trades and providing for the exercise of them in proper places, it is conceived that these only by our law can be considered as nuisances in other places. These, as stated Ch. 74, a. 5, are seven in number, to wit, killing creatures for meat, distilling spirits, trying tallow or oil, currying leather, and making earthen ware. By act June 7, 1785, and by act of March 10, 1797, business of sail-making and business of keeping livery stables, and these only when assigned to certain places by the selectmen of a town, and they are used in other places. When buildings &c. are nuisances and for the various proceedings as to them, see said Ch. 74.

Mass. Acts, June 7, 1785; March 10, 1797; March 4, 1800.

§ 3. In the act of March 4, 1800, there cited, the legislature seems to have precisely defined a nuisance as to these trades, by saying that any person injured by such nuisance, "either in his comfort or the enjoyment of his estate," may have an action on the case &c., though this definition or

Maine Act, ch. 24.

CH. 208. description of a nuisance is very general, yet perhaps it is as good a one as can be given in a few words.

Art. 12.

Indictment  
for keeping  
hogs near a  
public street,  
Cro. C. C.  
533, 534.

§ 4. Prosecutions for carrying on these offensive trades to the nuisance of the people have been very unfrequent; the reason probably has been, they have not usually been viewed as nuisances, until places have been legally assigned for the exercise of them, and not then if exercised in the places assigned, and if not so, then clearly nuisances. So that the remedy for an evil, vague and indefinite in itself, has been simple and plain.

§ 5. With regard to certain trades, as those of a butcher, shoemaker, currier, and tanner, there has been a law ever since the year 1651, forbidding the same man to exercise more than one of them. These four trades, it will be observed, include the whole process in producing and working up leather, in doing which there ever has been much room for deception and cheating; for this reason, probably among others, legislators have thought it best not to suffer any one man to have in his hands the whole process, taking off the hide or skin to manufacturing shoes. This law for a long time has been but little regarded, so not reprinted in the late volume of Colony and Province Laws. In 1776, there was an indictment against one Richardson on it, for exercising the mystery of butcher and tanner, quashed.

Also Mass.  
Act of 1698.

ART. 11. *Unwholesome provisions.* Knowingly to sell them is an offence at common law, and the offender may be indicted by that law and fined and imprisoned.

Mass. Act,  
March 8,  
1785.—Maine  
Act, ch. 23.

This act provides, that if any person shall sell any diseased, corrupted, contagious, or unwholesome provisions, whether for meat or drink, knowing the same, without making it known to the buyer; on conviction in the Sessions or Supreme Judicial Court, punishment, fine, imprisonment, pillory, binding to the good behaviour, any or all of these punishments. Virginia act of 1786.

51 H. III. st.  
6.—4 Bl.  
Com. 162.

By this act, a part of our common law, selling unwholesome provisions, as corrupted wine, contagious or unwholesome flesh, was made an offence; punishment, fine and imprisonment, and pillory for a second offence,—we practised on this law till 1785. Acts in Mass., 2 M. L. 1001; Maine act, ch. 29, to prevent abuses in distilling strong liquors.

ART. 12. *Indictment.*

Loft, 556.

§ 1. For every common and public nuisance the remedy is by indictment, and therefore one shall not have a private action.

1 W. Bl. 570,  
Bullbroke v.  
Goodere.

§ 2. The violation of a public penal law is not indictable as a nuisance. The offence was committed contrary to a penal statute, and Lord Mansfield said the punishment must fol-

low the method which that act prescribes. The deft. cut the plt's. nets and took his fish, and contended that this net &c. was a nuisance, and so he had a right to abate ; but the court held, this fishing being contrary to statute 1 Ed. 1. c. 17, was a public crime, punishable only as the act prescribed. CH. 208.  
Art. 12.

§ 3. It is not an offence indictable as a nuisance to darken a street by enlarging a house or other building. But keeping gunpowder in great quantities is a nuisance and indictable. Held, where it endangered the church and houses where it was kept. 1 Ld. Raym.  
737, Rex v.  
Webb.—2  
Stra. 1167,  
Rex v. Tay-  
lor.

§ 4. The deft. was convicted on an indictment for making great noises in the night with a speaking trumpet, to the disturbance of the neighbourhood. This the court held to be a nuisance, and fined the deft. Ch. 5. 1 Stra. 704,  
Rex v. Smith.

§ 5. The deft. was indicted for intruding upon public property ; and held, he could not justify his intrusion by pleading that his entry &c. was beneficial to the public. 1 Dallas, 160.

§ 6. The deft. was indicted for a nuisance in keeping fifty barrels of gunpowder in a certain house near the dwelling houses of divers good citizens of the State, and near a certain public street &c. Held, these facts so charged did not amount to a nuisance ; but that it had been otherwise if it had been alleged to have been improvidently and negligently kept. 1 Johns. R.  
78, The Peo-  
ple v. Sands.

§ 7. Held, that it is not a nuisance indictable, for that the deft. converted his house into an hospital for taking in and delivering lewd, idle, and disorderly unmarried women, who, when delivered, left their children to be chargeable to the parish. Indictment quashed. Lord Mansfield asked by what law is it criminal to deliver a woman when she is with child ? 3 Burr. 1645,  
Rex v.  
M'Donald.

§ 8. A bare trespass is not indictable, being a mere private injury, though laid *vi et armis*. As where the charge was for unlawfully entering into his yard and digging the ground, and erecting a shed ; and unlawfully, and with force and arms putting out and expelling one Mr. Sweet, the owner, from his possession, and keeping him out of possession, held, only a trespass, for which an action lay and not an indictment. See post, Ch. 211, s. 9. 3 Burr. 1698,  
Rex v. Storr  
& al.

§ 9. The deft. was indicted, for that he with force and arms pulled off the thatch of a man's dwelling-house, he being in peaceable possession of it. Indictment was quashed, because no nuisance, but a mere private trespass, *vi et armis*, and no actual force laid, do not imply an indictable offence. Taking all these cases together it was plain the court held, that some actual force must be stated in the indictment, some actual breach of the peace, to make the offence indictable. 3 Burr. 1706,  
Rex v. At-  
kins.

§ 10. The deft. was indicted for a nuisance in keeping a house for inoculating for the small-pox. The court refused to 4 Burr. 2116,  
Rex v. Sut-  
ton.

CH. 208. quash the indictment on motion, saying, you must demur to it.  
 Art. 12. But the court will quash on motion in a clear case, as 3 Burr.  
 1645, 1698.

Crown C.  
 Comp. 519 to  
 560.

§ 11. Sundry forms of indictments for nuisances: as 1. Against a butcher for using his shop as a slaughter-house in a public market: 2. For placing putts in a navigable river &c.: 3. For keeping a disorderly house: 4. For digging a hole in a public street: 5. For laying soil in it: 6. For placing empty drays in it, all obstructing it: 7. For erecting a cistern in it: 8. For breaking the sabbath by keeping open shop, (butchers) *quare*, if indictable at common law: 9. For placing two carts for selling pease in a public street: 10. Two loads of dirt in a common footway: 11. For keeping hogs near a public street: 12. For erecting a furnace with a boiler for boiling tripe and offal &c.: 13. For boiling bullock's blood for making colours: 14. For stopping an ancient watercourse, so as to overflow a way: 15. Against scavengers for not cleansing the streets: 17. Against inhabitants of a parish for not repairing a way: 18. For continuing a hedge in a way: 19. For not repairing a way: 20. For not repairing &c.: 21. Same. These cases are thus noticed in order to observe that all these twenty-one indictments are at common law, except No. 16, and all without objection except No. 8. Pleas, that certain merchants are bound to repair a way on an indictment for a nuisance, and that the inhabitants of the parish at large are not; pleaded by two of the parish for themselves and the rest, except those so bound. Replication, by the king's attorney, said inhabitants ought not to be discharged &c. because bound &c. Held, 5 D. & E. 490, the inhabitants of a whole parish must be indicted in such case, and not of a part of it. The same principle holds in regard to our towns. Pages 54 to 59, Crown. C. Comp., many good rules and cases on this subject, in all of which, (generally noticed above, and Ch. 74,) it is an invariable rule, that the indictment for a nuisance, either by doing a thing annoying the king's subjects or neglecting what the common good requires, must state the nuisance to be to all the people, &c. or common grievance, or it must appear so to be on the face of the indictment. Hence, whenever it appears in the indictment to be only so to some individuals, as the inhabitants of a town or parish &c., it is not an indictable nuisance, but only a ground of action by those injured; nor is this general principle shaken by the decision that a nuisance, as want of repairs &c. in a town-way, is indictable, for a town-way is in fact used by all the citizens generally, otherwise perhaps of a private way leading to a mill &c.

§ 12. Held, an indictment for a nuisance is sufficiently certain, charging the deft. on divers days &c. keeping a certain

Indictment  
 against the  
 master of a  
 work-house  
 and a sur-  
 geon, for  
 keeping the  
 body of a  
 poor person  
 who died in  
 it to be dis-  
 sected,  
 4 Went. 219,  
 222, 4 coun's.

2 Burr. 1232,  
 Rex v. Hig-  
 ginson.

common, ill-governed, and disorderly house ; and in it for his lucre, procuring evil and ill-disposed persons of ill name to assemble and remain fighting of cocks, boxing, playing at cudgels, &c. to the common nuisance of all the subjects &c. CH. 203.  
Art. 12.

§ 13. *House by the highway a nuisance.* Held, if tenant at will occupy a house near the highway likely to fall down, he is indictable ; for it is not the title but the occupancy that respects the public, for the house is a nuisance as it is, and his continuing it in such falling condition is a nuisance, and the public looks to the occupier, and not to the estate. 1 Salk. 357,  
Queen v.  
Watts.

§ 14. But it is not an indictable nuisance, to set one in a foot-way in a public street in London from day to day to deliver out printed bills of the debt's. occupation, whereby it was obstructed. 1 Burr. 515,  
Rex v. Sar-  
mon.

§ 15. Indictment for not repairing a bridge by which the inhabitants could not pass that way, to their nuisance, is good. So if the act appear to be a common nuisance. the indictment may be good, though not laid to the nuisance of all &c. 3 Bac. Abr.  
687.—1 Co.  
148.

§ 16. Indictments for nuisances in a river, in a private way, near a public way,—for selling unwholesome provisions. Formerly there were some questions as to indictments in these cases ; but of late years indictments in the forms in the subjoined notes have been sustained, and the debts. convicted on them. In these forms we see the law in the cases.

*Notes.*—Indictment for a nuisance in a tide river in S——. Present, that there now is, and for a time whereof &c. there always has been situated in said S——, in said county of E——, a certain navigable river, called South River, flowing from the high sea up into said S——, and in which river, from the sea to the head thereof, all the citizens of the said Commonwealth, for a time, whereof &c. have been used to pass and repass with their ships, boats, and other vessels, from the sea up to the head of the said river. And the jurors aforesaid, upon their oaths, further present, that R. W. on (June 10, 1789,) with force and arms, did unlawfully erect and build a certain wharf, of the length of 20 feet and breadth of 20 feet, in and upon the same river, and the same wharf, so erected and built in and upon the same river, did continue from that day to —, by reason whereof the citizens of the said Commonwealth could not, during that time, pass with their ships, boats, and other vessels, in, upon, and through the same river as they had been wont and ought to do, without great peril and danger ; to the great damage and common nuisance of all the liege citizens of the said Commonwealth, in and by the same river passing and repassing with their ships, boats, and other vessels, and against the peace of &c. Plea, not guilty.

See a. 40.—  
Cro. C. C.  
620, 622.

Indictment  
for diverting  
a water-  
course run-  
ning into a  
great pond,  
4 Wentw.  
223, 224.—  
For killing  
sheep in the  
highway &c.  
and there  
leaving the  
filth, 224, 225.  
—For erect-  
ing a neces-  
sary house  
too near the  
highway,  
225, 227.

Ch. 208.

Art. 12.



§ 17. Indictment for a nuisance in a private way.—Present, that on (May 20, 1793,) there was, by the Selectmen of said S——, a private way laid out in said town, leading and extending from —— to ——, which way was afterwards reported by them to said town at a public meeting of the inhabitants thereof, duly notified, warned, and held at the court-house in said S——, on the —— day of —— 1793, and accepted &c. ; and that there was then erected, and standing on land over which the said way was laid out, a small building, improved as a dwelling house, and that E. M. of &c. hath with force and arms at said S——, the said building so erected as aforesaid, on said —— day of May, standing and being in and upon the said way, voluntarily continued in and upon the same way from —— to ——, and thereby entirely obstructed the said private way, to the common nuisance of the good people of the Commonwealth and others, especially the inhabitants of said town, in, by, and through the same way &c. &c. Plea, not guilty.—Was a town way for all the inhabitants &c.

§ 18. Indictment at common law for selling unwholesome provisions, (Jan. 1797,) :—present, that J. of &c. on —— at ——, had as his property, a certain cow, sick, diseased, and vexed with sores and putrid distempers, by which the flesh of the same cow was rendered putrid and unwholesome, and which cow there on the same 10th day of January the said J. killed, and prepared for selling the flesh of the same for beef ; and that the said J. there, the same day, with force and arms, did fraudulently, wickedly, and deceitfully, sell the four quarters of the same cow, so prepared, to one S. G. for, and as good wholesome flesh, he the said J. then and there, *well knowing* the same to be putrid, diseased, and unwholesome as aforesaid, against the peace and dignity of &c. Plea, not guilty. An indictment, in this case, might have been framed on Massachusetts statute of March 8, 1785, and merely stated the deft. knowing &c. deceitfully &c. sold unwholesome flesh to one S. G.

Indictment  
for boiling  
tripe &c. in  
a street, 6  
Wentw. 417.

2 Mor. E. 55,  
56, Rex v.  
White.

§ 19. Indictment for erecting noisome buildings &c. near the highway.—Present, that —— on —— at ——, near the king's common highway, there, and near the dwelling houses of several of the inhabitants, the defts. erected two buildings for making noisome, stinking, and offensive liquors ; and then and there made fires of sea coal and other things, which sent forth abundance of noisome, offensive, and stinking smoke ; and made &c. great quantities of noisome, offensive, and stinking liquors, called acid spirit of sulphur, oil of vitriol, and oil of *aqua fortis*, whereby, and by reason of which noisome, offensive, and stinking smoke, &c. the air was impregnated with

noisome and offensive stinks and smells, to the common nuisance of all the king's liege subjects inhabiting &c. and travelling and passing the said king's common highway, and against the peace &c. These indictments for nuisances were all supported in point of matter and form, though very ably objected to by the counsel of the several defts.

Ch. 208.

Art. 14



§ 20. Nuisance in a street by the standing of carts &c. A waggoner occupied one side of a public street in a city, before his warehouse, in loading and unloading his waggons, for several hours at a time, night and day, and had one waggon, at least, usually standing there, so that no carriage could pass that side of the street, and sometimes foot passengers were incommoded by cumbrous goods lying on the ground, ready for loading; held, this was an indictable offence, as a public nuisance, though there were room for two carriages to pass the opposite side of the street. See 7 D. & E. 467.

6 East, 427, Rex v. Russel.—But Roll. Abr. 137, not a nuisance to unlade billets by one's house, if taken away in a reasonable time.

§ 21. Among nuisances may be placed drains and common sewers, not kept in order; statutes as to Massachusetts, Feb. 20, 1797; Maine act, Ch. 121.

ART. 13. *Public health.* "Injuries affecting a man's health are those, where by any *unwholesome* practices of another, a man sustains any apparent damage in his vigour or constitution, as by selling him bad provision or wine, (art. 11.) by the exercise of a noisome trade, which infects the air in his neighbourhood, or by the neglect or unskillful management of his physician, surgeon, or apothecary." When the injury is merely to an individual, the remedy is by action at common law; but when to many, as making a common nuisance, by corrupting the air or water many use, the remedy is by indictment as above. So for selling unwholesome provisions, meats or drinks, the remedy is by indictment, (see art. 11.) though the sale be to an individual, and by statute. These injuries to health cannot be too carefully guarded against; they are often a long time concealed, and secretly and gradually destroying it. A contagious sickness, in a measure concealed, may be communicated to thousands, if good laws against it be not made, and faithfully executed. Hence the necessity of regular and well formed quarantine laws, punctually carried into effect. Act of Virginia of 1735, guards as against a nuisance, driving diseased cattle from place to place.

3 Bl. Com. 122.—4 Bl. Com.

Indictment for bringing a pauper, having the small pox, into the parish, who died, and the parish put to expense of her burial, 4 Wentw. 353, 354.

ART. 14. *Contagious sickness or infectious diseases.* Every well governed society has found it necessary to enact laws to prevent the spreading of these. In the Register (267) is a writ for removing from society one affected with the leprosy; also the king's writ stating the air was corrupted, and rendered unhealthy by filth &c. and commanding the king's officers to



**Ch. 208.** remove the same. Many statutes have existed in England to prevent these evils; and in the United States, from the first settlement of the country, especially in Massachusetts, the last revision of which was in June 1797. Several acts were passed in the time of the Colony, and in the time of the Province; one in 1701,—another in 1730,—additional in 1751,—another, Rainsford's Island, 1757,—and an additional act in 1758. In 1776 and 1778, acts were passed empowering the Sessions to allow one or more inoculating hospitals in each county.

Mass. Act,  
June 22,  
1797.—  
Maine Act,  
ch. 126, 127.

Laws of Ken-  
tucky as to  
the small-  
pox &c. Jan.  
30, 1798, the  
Virginia acts  
revised, and  
allowing  
inoculation  
by license in  
certain cases

**ART. 15. State laws.** This act, "to prevent the spreading of contagious sickness," enacts, that "when it shall happen that any person or persons coming from abroad, or belonging to any town or place within this State, shall be visited, or shall lately before have been visited with the plague, small-pox, pestilential or malignant fever, or other contagious sickness, the infection whereof may probably be communicated to others," the selectmen of the town where such persons may arrive or be, are empowered "to take care and make effectual provision in the best way they can, for the preservation of the inhabitants, by removing such sick or infected person or persons, and placing him or them in a separate house or houses, and by providing nurses, attendance, and other assistance and necessaries for them," at the charge of the parties themselves, their parents or masters, if able, or otherwise at the charge of the town or place whereto they belong; and if not inhabitants of any town in the State, then at its charge.

§ 3. Sect. 2 provides, that persons coming from infected places, inform the selectmen, on penalty of \$100, and depart if able, and so directed by the selectmen; and not to return without previous permission, on penalty of \$400. This long act makes many other provisions for obtaining the objects of it, as forbidding persons to entertain those infected,—appointing persons to attend at ferries &c.—requiring officers to remove infected persons on justices' warrants,—securing infected baggage, goods, &c. till free from infection,—breaking warehouses &c. in search of them, calling aid,—examining and detaining suspected vessels,—forbidding communication from them with persons on shore &c.—providing attendance,—adjourning courts,—and vesting powers in towns to appoint health committees to keep the streets &c. clean from filth that may "endanger the lives or health of the inhabitants," and giving the committee ample powers to the purpose.

Mass. Act,  
Feb. 28,  
1800 —  
Maine Act,  
ch. 127.

§ 4. This additional act adds several provisions to enforce the execution of the former act, as empowering the Selectmen of any sea-port town to order any vessel arriving to perform quarantine, "at such place as they may appoint, and

under such restrictions and regulations as they may judge expedient;" and all disobeying, when convicted on indictment or information, forfeit not above \$500, or liable to imprisonment &c. ; and other regulations as to *quarantine* of vessels.

Ch. 208.

Art. 16.

§ 5. Similar health and quarantine laws exist in most of the States, varying in regard to the officers who execute them, according to circumstances. Contagious sickness or infectious disease, is an evil in its nature, that requires, in every time and place, one and the same remedy nearly; that is, by means of health officers and health measures to keep clean the places in which filth may be collected and disease be engendered, and to keep those *infectiously* diseased separate and at a distance from those who are not, by means of hospitals, quarantine places, selected and guarded as prudence and existing circumstances dictate.

Mass. Act,  
as to the  
cow-pox, of  
March 6,  
1810.

ART. 16. *Health laws of Congress.*

§ 1. This act of Congress repealed the former health or quarantine laws, and enacted, that "the quarantines and other restraints which shall be required and established by the health laws of any State, or pursuant thereto, respecting any vessel arriving in, or bound to any port or district thereof, whether from a foreign port or place, or from another district of the United States, shall be duly observed by the collectors and all other officers of the revenue of the United States, appointed and employed for the several collection districts of such State respectively, and by the masters and crews of the several revenue cutters, and by the military officers who shall command in any fort or station upon the seacoast."

Act of Con-  
gress, Feb.  
28, 1799.

§ 2. "And all such officers of the United States shall be, and they hereby are authorized and required faithfully to aid in the execution of such quarantine and health laws, according to their respective powers and precincts, and as they shall be directed from time to time by the secretary of the treasury of the United States."

§ 3. "And the said secretary shall be, and he is hereby authorized, when a conformity to such quarantine and health laws shall require it, and in respect to vessels which shall be subject thereto, to prolong the terms limited for the entry of the same, and the report or entry of their cargoes, and to vary or dispense with any other regulations applicable to such report or entries." But nothing in this law is to enable any State to collect a duty of tonnage or impost, without consent of Congress; and provided no part of a cargo of any vessel be taken out or unladen but as by law allowed.

§ 4. Section 2 enacts, that when by the health laws of any State, or by the regulations made pursuant thereto, "any ves-

CH. 208.

Art. 17.

sel arriving within the collection district of such State, shall be prohibited from coming to the port of entry or delivery by law established in such district, and it shall be required or permitted by such health laws, that the cargo of such vessel shall or may be unladen at some other place within or near to such district, the collector authorized therein, after due report to him of the whole of such cargo, may grant his special warrant or permit for the unloading and discharge thereof, under the care of the surveyor or of one or more inspectors at some other place which such health laws shall permit, and upon the conditions and restrictions which shall be directed by the secretary of the treasury, or which such collector may for the time reasonably judge expedient for the security of the public revenue," provided &c. The other sections in this act provide, that warehouses may be procured for such cargoes; that revenue officers be removed in case of disease;—also, prisoners and public officers; also, that courts may be adjourned &c.

Act of Congress, April 8, 1794.

§ 5. And by this act whenever Congress shall be about to convene, and from the prevalence of contagious sickness, or the existence of other circumstances it may, in the president's opinion, "be hazardous to the lives or health of the members to meet at the place" appointed, he may by proclamation "convene the Congress at such other place as he may judge proper."

§ 6. No judicial decisions upon the health laws, giving constructions of them, are found or recollected, and probably there never will be many; the due execution of them must materially depend, in the nature of things, upon a broad discretion in the health and revenue officer. What is a contagious sickness or an infectious disease, or what is a filthy place to engender disease or injure health, what is a proper time of quarantine, and what a proper place, how guarded and secured, and other questions arising in the execution of these laws, are questions incapable of precise answers, but must always depend on existing circumstances by which the decisions of these health officers must necessarily be governed.

4 Went. 360.  
362.

As to the many offences noticed in this chapter, as the several kinds of nuisances and offences affecting the public health, the same remark may be made as was made in Ch. 6, a. 7. s. 3. Indictment against a midwife for so unskillfully delivering a woman that she died.

Mass. Acts,  
June 9, 1785,  
and June 21,  
1799, old  
laws revised;  
Maine Act,  
ch. 171.

ART. 17. *Pedlars &c.* Statutes against, in Massachusetts have ever existed forbidding hawkers, pedlars, and petty chapmen or "other persons going from town to town on foot, or with horse or horses, or otherwise carrying to sell or exposing to sale, any wares, goods, or merchandize," on a penalty not

exceeding £4, nor less than 20s., and a quarter of the goods to the informer &c. But these acts do not extend to goods of "the real worker or maker" of them, his servants or agents, or to articles manufactured in this State, or to any fish, fruits, or provisions; or to any tinker, cooper, glazier, or mender. And licensed persons are forbidden to entertain such pedlars &c. not allowed.

CH. 209.  
Art. 1.



This act punishes in bridewell or house of correction with hard labour and whipping, prostitution, pretending to skill in palmistry, &c. vagrancy, begging, juggling, discovering lost goods, vagabonds, and wanderers, idle persons having no visible means of living.

Statute of N.  
York, Sess.  
11, ch. 81, R.  
L. 124.

## CHAPTER CCIX.

### PRISONS, BREACH OF, &c.

#### ART. 1. *General principles.*

§ 1. Prisons or goals are to be considered in two points of view: 1. How provided and established: 2. What is the offence in breaking them and how punished. Our prisons are for confining state offenders, also offenders against the laws of the union. Prisons must necessarily be as ancient as laws and society; strong and convenient places known by various names, for keeping in close custody debtors and offenders before and after judgment; before, in order to receive sentence or to be answerable for debts or demands; after, in execution. They are erected at the expense of the nation or of a state, or of a county or city, &c. as the case may be.

§ 2. Congress resolved, "that it be recommended to the legislatures of the several States to pass laws making it expressly the duty of the keepers of their gaols to receive and safe keep therein all prisoners committed under the authority of the United States, until they shall be discharged by the due course of the law thereof, under the like penalties as in the case of prisoners committed under the authority of such States respectively; the United States to pay for the use and keeping of such gaols at the rate of fifty cents per month for each prisoner that shall under their authority be committed thereto, during the time such prisoners shall be therein confined; and

Resolve of  
Congress,  
Sept. 23,  
1789.

CH. 209. also to support such prisoners as shall be committed for offences."

Art. 2.

Resolve of Congress, March 3, 1791.

§ 3. Congress resolved, "that in case any State shall not have complied with the said recommendation, the marshal in such State under the direction of the judge of the district, be authorized to hire a convenient place to serve as a temporary gaol, and to make the necessary provision for the safe keeping of prisoners committed under the authority of the United States, until permanent provision shall be made by law for that purpose;" and the marshal to be allowed his expense &c.

Mass. Act, Feb. 26, 1790.—

Maine Act, ch. 110.—  
Kentucky Acts, Feb. 3, 1798, Dec. 26, 1800.

§ 4. By this act the legislature of Massachusetts enacted, "that the keepers of the several gaols within this Commonwealth shall, under the like penalties as by law are provided for the custody and safe keeping the prisoners thereof, take custody of, and safely keep all prisoners committed under the authority of the United States until they shall be discharged by due course of the laws thereof." County treasurers directed to receive the monies mentioned in said resolve of 1789.

§ 5. Most if not all the States granted the use of their prisons in like manner to the United States. Thus these gaols became both State and Federal gaols, and generally have continued to be such.

Massachusetts act, Feb. 7, 1814, limited this right to prisoners committed by the judicial authority of the United States, meaning generally to exclude prisoners of war.

ART. 2. *Massachusetts statutes &c.*

Mass. Act, March 12, 1784—Maine Act, ch. 110.

§ 1. By this act (the former laws revised) it is enacted, "that the sheriff of each county shall have the custody, rule, and charge of the gaols therein, and of all prisoners within such gaol or gaols, and shall keep the same himself personally or by his deputy, for whom he shall be answerable."

Mass. Act, Feb. 21, 1785.

§ 2. By this act (former laws revised) it is enacted, that the general Sessions from time to time assess the polls and estates within their several counties in such sums as may be necessary to erect and keep in repair a good sufficient gaol in each town where a court is by law to be holden; and to direct and order the building and repairing such gaol according to their discretion; and the Sessions is empowered to set bounds to prison yards, and by the same act to regulate the living of prisoners &c., and to adjust and settle disputes about the same. By this act also, escapes through the insufficiency of the gaol or negligence of the sheriff &c. are regulated, as Ch. 65.

[Mass. Acts, March 4, 1809, June 20, 1809, Feb. 28, 1811, June 26, 1811.]

§ 3. *Furnishing tools &c.* Also enacted, that if any person convey, without the privity of the keeper, any tools to a prisoner to aid his escape, he shall be fined not exceeding £100, or suffer such corporal punishment, not exceeding forty stripes,

as the court shall direct ; and if the prisoner escape by means of such tools, the said party shall pay and suffer as the prisoner would, except where the prisoner would be punished with death, the party shall be punished by fine, imprisonment, whipping, pillory, and gallows, or one or more thereof.

CH. 209.  
Art. 2.

§ 4. Also enacted, that if the keeper voluntarily suffer the prisoner to escape, he shall suffer as the prisoner would, and if negligently, he shall pay such fine as the court shall award. Provided, if a prisoner for debt escape and is recovered in three months and returned to prison again, the sheriff shall be answerable only for such costs as may have arisen in any action previously commenced against him. All fines in this act to be recovered by indictment, and applied to building and repairing the gaols in the county.

§ 5. Also enacted, the sheriff keep a calendar, or list of prisoners, committed to any prison under his care, in a large bound book, therein entering the names of all prisoners with their places of abode and additions ; the times of their commitment, and for what cause, and by what authority committed ; and of such as are committed for criminal offences, a description of their persons ; the time of liberation of each prisoner, his name, and description, as aforesaid, and the authority by which liberated ; and if any prisoner escape, the time and manner of his escape.

§ 6. Also enacted, the keeper return a list of prisoners at each term in the county of the Supreme Judicial Court and Sessions ; on neglect so to do, to be fined at discretion.

§ 7. Also enacted, that warrants, writs, mittimuses, &c. be kept filed in order, and on the removal or death of the sheriff to be delivered over to his successor, on penalty of £50, to be paid by the executors or administrators of the deceased sheriff, or by a sheriff removed, to be recovered by any one who shall prosecute therefor.

Also enacted, the Sessions provide in the prisons, at the county's expense, sufficient and convenient apartments for receiving and lodging prisoners for debt separate and distinct from the felons and criminals ; said court, every quarter, to examine into and see the prisons are safe, well provided, and clean, &c.

§ 8. Also enacted, that any person committed for debt, on mesne process, or on execution, shall be allowed to have a chamber and lodging in any of the houses or apartments belonging to such prison, and liberty of the yard within the same, in the day time, paying therefor &c., provided he give bond with sufficient surety or sureties, within the county, to the creditor, in double the sum for which he is imprisoned, conditioned to remain a true prisoner, &c. ; two justices quo-

CH. 209. *rum unus* fix the sureties. If the creditor refuse to take the

Art. 3. bond, it is left with the sheriff till the creditor demand it.

When the bond is sued, judgment is for the penalty. Act, June 21, 1811, punishes breach of state-prison.

4 Bl. Com.  
130.

§ 9. Breach of prison, by the offender himself, when committed for any cause, was felony at common law, in England. In the year 1657, provision was made by law for houses of correction in each county, and till provided prisons to be used for those purposes.

ART. 3. *Judicial decisions.*

Mass. S. J.  
Court, Essex,  
Dennis' case.

§ 1. Dennis having been committed to gaol, broke gaol, and was indicted at common law for breaking prison;—had been committed for stealing one hundred pounds of gun-powder, value £30. The court held, that it was not necessary to prove the felony for which he was committed, nor that one had been committed; on the ground, the *breaking prison* was a new and principal offence, and not at all in the nature of an accessory offence.

3 Johns. R.  
449, the People  
v. Duell.

§ 2. The deft. was confined in the county prison, for petit larceny; and he broke prison. And held, the prison breach was a felony, for which the deft. might be sentenced to the state-prison, for a term not exceeding fourteen years.

As to various decisions on prison-bonds for the liberty of the yard, see *civil* actions in former chapters, and *Bartlett v. Welles & al.*

Crown C. C.  
662, 668.

§ 3. An indictment lies, at common law, for assisting one to escape from prison, charged with a forfeiture to the king, on a writ out of the exchequer.

2 Bac. Abr.  
636.

§ 4. And, at common law, "the offence of breaking goal" was no less than *felony*, and this whether the party was committed in a criminal or civil case, or whether he was actually within the walls of a prison, or only in the stocks, or in the custody of any person who had lawfully arrested him." But the severity of the law, in this case, was relaxed by the statute *de frangentibus prisonam*, (1 Ed. II. st. 2,) which enacted, "that none from henceforth that breaketh prison shall have judgment of life or member for breaking prison only, except the cause for which he was taken and imprisoned did require such judgment, if he had been convicted thereupon, according to the law and custom of the realm."

Indictment  
for pulling  
down a pris-  
on, Wentw.  
401.—Mass.  
C. & P. laws,  
177, 334,  
337, 346.

§ 5. By this act, if one committed for a crime punished by death, or loss of member, and breaks prison, for such breach he is so punishable. This is our law still, for it may be observed, our statutes in the Colony, Province, or State, as to prison breach, do not relate to the prisoner himself breaking prison, but only to others who aid him, or to the gaoler. This law is not material in general, because if the prisoner can be

taken and punished for prison breach, he may be punished in the same manner for the original offence. See Massachusetts Colony and Province laws, on this subject of prison breach, passed 1646, 1655, 1657, 1663, 1669, 1699, 1700.

CH. 209.  
Art. 4.

§ 6. In the act passed in 1700, there was the following clause, not revised, to wit, "that whosoever breaketh prison, or shall make his escape from an officer, after his being arrested or imprisoned for any crime, his breach of prison or flight shall be accounted and esteemed in the law one evidence to convict him of the crime, wherewith he stands charged in the warrant for his apprehension or commitment." This clause clearly continued in force till February 21, 1785, and as the act then passed did not repeal the former statutes, on this subject of prison breach, *quære*, if this clause is not yet in force.

ART. 4. Suppose an innocent person be arrested or imprisoned for a capital, or other crime, and break prison, how is he to be punished on 1 Ed. II. st. 2. We have no decision of our own on this point. But it is conceived the following English decisions apply to such a case; being made on that statute generally adopted here as to the prisoner himself.

§ 1. Any place is a prison, even a private house, "wherein a person, under a lawful arrest for a supposed capital offence, is restrained from his liberty." 2 Inst. 589.—Dyer, 99.

§ 2. If the party breaking prison be taken on a *capias*, on an indictment, "it is not material whether any such crime as that of which he is accused, were in truth committed or not, for there is an accusation against him on record, which makes the commitment lawful," though he be innocent. And one also is within the statute if he be committed by a lawful *mittimus*, on suspicion of felony, actually committed, though not indicted; for he is legally in custody, and ought to submit till duly discharged. But if no felony be done, and the prisoner be not indicted, no *mittimus* for such supposed crime will bring him within the act, as his imprisonment is not justifiable. Again, though a felony be done, yet no cause to suspect the prisoner, and the *mittimus* be not in due form, his breaking prison is not felony; for in such case the lawfulness of the imprisonment depends wholly on the *mittimus*; and where that is defective there is nothing to support the imprisonment. Hale's P. C. 107.—2 Bac. Abr. 635.—1 Hale's P. C. 109.—2 Inst. 590.

§ 3. There must be an actual breaking of the prison, by some actual force or violence. As if the prisoner pass out at an open door, or through a breach made by others, he is not within the act; but only guilty of a misdemeanor; nor is breaking prison, by reason of fire &c., within the act. And it is not material whether the felony charged on the prisoner

1 Hale's P. C.  
108.—2 Bac.  
Abr. 236.



CH. 209. be such at common law, or by statute passed before he breaks the prison; and before he breaks it, the felony must be complete as by the death of the party stricken &c. And if the

Art. 5.

2 Haw. P. C. 1267.

offence for which one is committed be but a trespass, calling it a felony in the *mittimus* does not make it one, or bring the prisoner's case within the act. So if a felony, in fact, is committed by him, calling it a *trespass in the mittimus* will not alter the case; for the real cause of commitment is what the statute regards, and that is the offence which cannot be increased or lessened by any mistake in the *mittimus*.

2 Haw. P. C. 127, 128.

§ 4. The case of a person attainted is within the statute, as judgment is already rendered. And the crime of prison breach is but felony by one committed for treason, unless to aid traitors to escape; for then he becomes a principal in treason.

2 Bac. Abr. 636.—2 Haw. P. C. 127, 128.

§ 5. He that breaks prison may be proceeded against for it, before he be convicted of the crime for which committed; because the prison breach is a distinct and independent crime. But the sheriff's return of prison breach is not sufficient ground for arraigning a man without an indictment.

1 Hale's P. C. 109.

§ 6. It is not sufficient to indict a man generally for having feloniously broken prison; but the case must be set forth specially, that it may appear that he was lawfully in prison for a capital offence.

9 Johns. R. 70, 71, The People v. Tompkins, Same v. Steel.

§ 7. Lying in wait near a prison by agreement with a prisoner in it for felony, and carrying her away, is a misdemeanor at common law, and not an offence against the New York act, (sess. 24, c. 58,) which punishes "aiding or assisting any person in gaol in escaping or attempting to escape from such gaol, though no escape be made." It seems to be the true construction of such law, so to assist, as to aid the prisoner while within the gaol to escape or attempt to escape. Judgment reversed.

#### ART. 5. Pound breach.

Mass. C. & P. Laws, 176.—New York act, sess. 24, c. 78, a like provision.

§ 1. This offence has been the subject of statute law ever since the year 1645. In that year the Colony legislature enacted, "that there should be one sufficient pound or more made and maintained in every town and village within this jurisdiction, for the impounding of all such swine and cattle as shall be found in any cornfield or other inclosure."

§ 2. That "if any person shall resist or rescue any cattle going to pound, or shall by any way or means convey them out of pound or other custody of the law, whereby the party wronged may lose his damages, and the law be eluded, that in case of mere rescue, the party so offending shall forfeit to the treasury forty shillings; and in case of pound breach £5, and shall also pay damages to the party wronged" &c.; and if

unable to pay, to be whipped not exceeding twenty stripes for "the mere rescue or pound breach." CH. 209.  
Art. 5.

§ 3. This act was a mere revision of that of the Colony,—adding, if such offences be committed by "apprentices or persons under age, and not having wherewith to satisfy the law, and their parents or masters refused to pay the fine and damages," the justices had power on conviction to commit the offender to gaol, there to remain till satisfaction be made, or in lieu of the fine to punish by imprisonment, not exceeding sixty days, leaving the party injured to his action for his damages "of the parent or master of such child or apprentice, which such parent or master respectively shall be liable to have recovered of him upon an action to be therefor brought," and execution accordingly. Penalties on towns of £10 for not keeping pounds according to law, to be recovered by bill, information, &c.; half to the town and half to the informer. Mass. Act,  
1698.—  
Maine Act,  
128.  
  
Mass. Act,  
1728.

§ 4. This act was a mere revision of the above statutes; except by this act the penalties may be recovered by an action of debt, or upon an indictment; and by it the party injured by apprentices or minors, may sue them, or their parents or masters, at his election, to recover his double damages for pound breach, in which action the deft. is not allowed to give in evidence the insufficiency of the fence, "or that the creatures when taken were under such circumstances as to render the impounding illegal, to prevent the party's recovering his full damages." And this action is also extended to the recovery of damages occasioned by the rescue of any creatures taken up "for being at large out of the owner's inclosure, or for doing damage" in improved grounds &c. Mass. Act,  
Feb 14,  
1789.

§ 5. In New York, cattle are not be impounded until the damage has been ascertained and appraised by two fence-viewers, according to the statute laws of New York, 1 Vol. p. 333, 334. 2 Johns. R.  
191, Pratt v.  
Petrie.

§ 6. By this act, (Virginia law revised) the justices of every county court must cause pounds to be made at the several court-houses, with good and sufficient fence, gate, lock and key, where all stray horses or mares above two years old, taken up within twenty miles of the court-house, shall be kept on the first day of every court, for three courts successively, after the same is taken up, from 12 till 4 o'clock the same day, that the owner may have an opportunity of claiming his or her property; and the person who takes up a horse, mare, or colt, not above two years old, must advertise the same at the door of the court-house as is required in case of any stray cattle, sheep, hogs, or goats;—exceptions as to those taken up more than twenty miles from the court-house. The justices of Ken. Act,  
Feb. 10,  
1798, sec. 4.

CH. 210. the county court appoint a suitable pound-keeper to take care of the pound, and to keep it in repair; and for every failure in his duty, he forfeits 6s. with costs, recoverable before any justice of the county. Penalty for every breach of the act is \$10, recoverable, with costs, before any justice of the peace in the State.

Art. 1.

## CHAPTER CCX.

### PERJURY AND SUBORNATION OF PERJURY.

#### ART. 1. *Perjury at common law.*

3 Salk. 270.

—3 Inst. 164.

—4 Bl. Com.

136, 137, 138.

—4 Com. D.

688.—12 Co.

102.—3 Cro.

8.—5 Mod.

342.—French

Penal Code,

art. 360 to

366; by this

the punish-

ment varies

from death

to civic de-

gradation.

§ 1. In many cases perjury may be indicted at common law, where it cannot be on the statutes against perjury. This crime against public justice is defined by Sir Edward Coke, "to be a crime committed when a lawful oath is administered in some judicial proceeding, to a person who swears *wilfully, absolutely, and falsely*, in a matter *material* to the issue or point in question." The law takes no notice of any perjury, but such as is committed in some court of justice, having power to administer an oath; or before some magistrate or proper officer invested with a similar authority, in some proceeding relative to a civil suit or a criminal prosecution: for the law esteems all other oaths unnecessary at least, and hence will not punish the breach of them. The perjury must be wilful, positive, and absolute, not upon surprise &c. It must be in some point material to the question in dispute, not in a trifling collateral circumstance, to which no regard is paid. 10 Johns. R. 167. Perjury may be committed in taking an oath erroneously administered, especially while the proceedings remain unreversed; but there is none where the court has no cognizance of the case. Yelv. 111.

§ 2. *Subornation of perjury* is the offence of procuring another to take such false oath as constitutes perjury in the principal. The punishment of perjury was anciently death; then banishment or cutting out the tongue; then forfeiture of goods; and now it is fine and imprisonment, and never more to be capable of bearing testimony. The statute of 5 Eliz. c. 9, inflicts perpetual infamy on one prosecuted on it, and a fine of £40 on the suborner &c.; "but the prosecution is

usually carried on for this offence at common law." Perjury, in capital cases, by the laws of France, is capital; but there they admit witnesses only on the side of the prosecution, and formerly used the rack to extort a confession from the accused. But less severe punishment is more reasonable where the witnesses on both sides are publicly examined, and the criminal not only has his witnesses allowed him by law, but even counsel appointed by the court, in capital cases, when he is too poor to engage his own counsel. And in the twelve tables, "*perjurii poena divina exitium, humana dedecus.*"

CH. 210.

Art. 2.

ART. 2. *Acts of Congress.*

§ 1. Sect. 18 of this act enacts, "that if any person shall wilfully and corruptly commit perjury, or shall by any means procure any person to commit corrupt and wilful perjury, on his or her oath or affirmation, in any suit, controversy, matter, or cause depending in any of the courts of the United States, or in any deposition taken in pursuance of the laws of the United States, every person so offending," on conviction, is punished with imprisonment not above three years, and fine not exceeding \$800, pillory one hour, and rendered incapable of testimony in any of the courts of the United States, until judgment reversed.

Act of Congress, April 30, 1790.

§ 2. Sect. 19 and 20 provide, that in all prosecutions for these offences, it shall be sufficient in any indictment to state the substance of the offence, and by what court or before whom the oath or affirmation was taken, (averring such court had competent power) together with proper averments to falsify the matters wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of the record or proceedings, other than as aforesaid, and without setting forth the power of the court &c. where the perjury is committed,—or agreed or promised to be committed.

§ 3. Persons are convicted and punished as for wilful and corrupt perjury in several cases by acts of Congress. By act, March 23, 1792, as to the army, and sect. 6, as where one claims a pension or the arrearages of a pension by a power, he must make oath or affirmation before some justice of the peace of the place where the same is payable, that such power or substitution is not given by reason of any transfer of such pension, or arrears of pension.

See Bankrupt act, March 4, 1800, sect. 15 and 21; act as to Duties, March 1, 1799, sect. 88; as to the Fisheries, act Feb. 16, 1792, sect. 6; as to Ships and Vessels, act Dec. 31, 1792, sect. 28, 30.

What is necessary to be alleged or not in an indictment for perjury, see forms, 4 Wentw. 230 to 304; Cro. C. C. 566 274. 12 Mass. R.

CH. 210. to 638; 6 Wentw. 396, 398, 423, 424 to 427, in justifying  
 Art. 3. bail.



ART. 3. *Massachusetts acts.*

Mass. Act,  
 Feb. 27, 1813.  
 —Maine Act,  
 c 12. —Ken.  
 Act, Dec. 19,  
 1801, p 24,  
 26, Vir. law  
 revised.

§ 1. After many statutes on this subject had been passed, from the earliest settlement of the country, this act was enacted, and in it was provided, "that if any person, being lawfully required to depose the truth in any proceeding in a court of justice, shall commit any manner of perjury, every person so offending," is, on conviction in the Supreme Judicial Court, punishable by solitary imprisonment, not exceeding three months, and after by confinement to hard labour, not less than two years, nor above fifteen years.

§ 2. Sect. 2 enacts, "that if any person shall commit subornation of perjury, by procuring another person to commit wilful and corrupt perjury as aforesaid, every person guilty of such subornation of perjury," on conviction, is punishable as above, in the first sect. of this act.

§ 3. Section 3 enacts, "that if any person shall wilfully and corruptly endeavour to incite or to procure another person to commit wilful and corrupt perjury as aforesaid, and the person so incited do not commit such perjury, the person so corruptly endeavouring" &c. is punishable by solitary imprisonment not exceeding two months, and by confinement afterwards to hard labour not exceeding five years.

Section 4 enacts, that the oath of any person so convicted shall not be received in any court of record until judgment reversed.

§ 4. Section 5 repeals the act passed March 9, 1785, against perjury &c.

By Massachusetts Colony statute of 1649, perjury was punished with death. Several Massachusetts statutes subject persons to the penalties of perjury for false swearing, as our trustee act &c. Mass. Laws, 49, 507, 679, 805.

4 Bl. Com.  
 351.

*Cases decided.* It has been decided, that one witness is not allowed to convict a man indicted for perjury, "because there is only one oath against another."

Leach. 270.—  
 4 Bl. Com.  
 Chris. Notes,  
 12.

§ 5. One may be guilty of perjury in swearing he believes a fact to be true which he must know to be false. 1 Leach, 242; 2 Chit. C. L. 305.

6 D. & E.  
 691, Holt v.  
 Scholefield.

§ 6. Perjured means false swearing in judicial proceedings, but foresworn does not. Therefore, to say of one, he has foresworn himself, is not actionable, without shewing the words related to some judicial proceeding in which the plt. had been sworn;—and any proceedings are judicial established by law, as where a pregnant woman makes oath before a justice, or a bankrupt before commissioners, or a poor debtor before two justices.

§ 7. If a man gives false evidence to the credit of a witness, though this be not the issue, yet it is perjury, and the charge of perjury ought to be as certain at common law as on the statute. The punishment is no more infamous on it than at common law. The difference is only this, where one is convicted on the statute, it is "a part of the judgment to be disabled; but at common law it is only a consequential disability." *Ergo*, in the latter case the king may pardon, and that restores him to his testimony; otherwise in the former, for in that case he must reverse the judgment, or cannot be restored." CH. 210.  
Art. 4.  
2 Salk. 513,  
Rex v. Green.

§ 8. If the plt. lose by the perjury of the def't's. witness, he cannot sue him until he is indicted and convicted, unless where an indictment will not lie. 3 Salk. 270.

§ 9. Several persons cannot be joined in one indictment for perjury, for perjury is a separate act in each, and is not like extortion, maintenance, &c. 2 Stra. 921,  
Rex v. Phillips & al.

Sessions has no jurisdiction of perjury. 2 Stra. 1088, *Rex v. Bainton*. As neither the acts of Congress nor of Massachusetts properly define perjury, it is still a question depending on adjudged cases, what is perjury, and in Massachusetts the forms of proceedings are on English principles, not so on the act of Congress.

**ART. 4. *What is perjury or not.***

§ 1. To constitute perjury there must be false swearing on oath; also in a court empowered to administer an oath in a course of justice; also in a matter material to the cause; also it must be a wilful and deliberate false swearing. Therefore, if one in the hurry of evidence, or from defect of memory, swears false by error or surprise, he is not guilty of perjury. On the other hand it will be perjury, even if a person swear to a true fact, if it can be proved he believed it false. The falsehood must be material to the matter in issue; hence if a witness swear A beat B with a dagger when it was with a staff, no perjury, as the beating only is material. *Haw. B. 1, ch. 69, s. 8.* Lofft, 771,  
Gilbert v.  
Berkinshaw.

§ 2. An affidavit was made that they the deponents, nor any of them never received; adjudged this was a sufficient denial, and they had received, and so false, they were indictable for perjury. Lofft, 274.

§ 3. False evidence if immaterial is not perjury. Whatever is perjury at common law is perjury under the 5 El., that statute does not alter the offence, (nor does ours,) but merely increases the punishment. 1 Ld. Raym.  
256.

§ 4. Where articles of the peace appeared malicious and false, the court committed the deponent for perjury, and stayed process on the articles. 2 Burr. 806,  
Rex v. Parnell.

CH. 210.

Art. 4.

1 D. & E. 68,  
71, Rex v.  
Aylett.  
8 East, 364.  
7 Mass. R.  
315. Cross-  
ly's case.

§ 5. In order to make perjury there must be : 1. An oath taken in a judicial proceeding : 2. Before a competent court or jurisdiction : 3. It must be material to the question pending : and 4. It must be false ; and according to Gilbert's case above, it must be wilfully and deliberately false. Not perjury but a misdemeanour to hold to bail on a false voucher abroad.

§ 6. An attorney of the court may commit perjury in his affidavit made in answer to a charge against him in a summary way, for his having in his possession blank pieces of paper with affidavit stamps, and the signatures of a master extraordinary in chancery, and another person at the bottom of the papers.

Mass. S. Jud.  
Court, Nov.  
1792, Essex,  
Common-  
wealth v.  
Tukesbury.

§ 7. This was an indictment for perjury ; facts were, William Parish complained to Justice Coffin of a violent assault and battery on one Insley. In the trial Tukesbury swore, that Parish was so beaten and abused that he did but little labour in the forenoon, and *nothing in the afternoon*, as the indictment for perjury alleged. Three witnesses swore he testified before the justice that Parish was able to do but little in the forenoon, and little or nothing in the afternoon ;—*little or nothing* appeared to be the fact. Held, this did not prove him guilty of perjury. In this case it was said that the perjury must be in a point or matter material to the issue, that what Tukesbury swore before the justice was not material ; the issue being, guilty or not guilty of breaking the peace ; and what he swore was only in aggravation of the battery. But the court said, and on an authority in Hawkins, that any matter which tended to aggravate or lessen the crime before the justice was material to the issue. The question before the justice was, is Insley guilty or not guilty of breaking the peace. In Pennsylvania there has been a decision, that if a man wilfully and deliberately swear to a matter he rashly believes when he has no probable cause to believe it, and it is false, he commits perjury. Riley's note on 2 Chit. C. L. 154.

Mass. S. Jud.  
Court, Lin-  
coln County,  
July, 1795,  
Common-  
wealth v.  
Cotteral.

§ 8. Cotteral was indicted for perjury in taking the poor debtor's oath and swearing out of jail for a debt. The indictment stated the judgment against him, the execution and commitment, his application to two justices, due notice to the plt., the meeting of the justices, and the oath he took, *verbatim* as in the act, falsely and corruptly. It was proved he had when he took the oath 140 bushels of corn, three hogs, and some other small articles ; also, that he had, pending said action or execution, a house and land, and sold them to his son-in-law for £44, which was a very low price ; there was strong appearances of a fraudulent sale. Held, that if the sale was fraudulent, the house and land remained his as before, and his swearing he had no estate was false, and perjury. He did not

account satisfactorily for the £44, or shew what he had done with it. Further held, that putting the house and land and £44, out of the case, he swore falsely in saying he had no estate to support him in prison &c., while he had the said corn and the other articles. CH. 210.  
Art. 4.

§ 9. It is perjury by the common law to swear a thing not known by him, though it be not false; but not if one take a false oath before him who has no lawful authority to administer it, or before him who has no jurisdiction of the cause; nor if the oath be not direct and positive, as if he say, as I remember; nor if not in a point material to the issue, as if the witness be asked if payment was made for such goods at one time, and he says it was, it will not be perjury if payment was made, though not all at the same time. So if he swear he beat and wounded A with a sword, it is not perjury if with a stick, for all that is material is the battery or wounding; but it is sufficient if it be any way material. And one may be prejudiced in his testimony as to the credit of a witness. 4 Com. D.  
639.  
  
3 Inst. 166,  
167.  
2 Roll. 41,  
42.  
  
4 Com. D.  
639.—5 Mod.  
348.—Salk.  
514.

§ 10. But a man shall not be indicted for perjury for a breach of his oath of office, as a judge, sheriff, &c. nor if the matter be explained by another part of his answer, or by a subsequent answer. 4 Com. D.  
639.—1 Sid.  
419.

§ 11. So to constitute perjury the oath must be taken by one sworn to depose the truth. Hence a false verdict is not perjury; for the jurors are not sworn to depose the truth, but to judge truly of the depositions of others. The same principle seems to hold at common law in regard to officers who are sworn faithfully to execute their offices; also, in regard to citizens who are sworn to bear true faith and allegiance &c. 3 Bac. Abr.  
815.

§ 12. It is not material whether the false oath is credited or not or to the damage of any one or not, the offence is in the abuse of public justice. 3 Bac. Abr.  
815.

§ 13. On a trial for perjury the oath will be taken as true until it be disproved; and therefore, the evidence must be strong, clear, and more numerous on the part of the prosecution than that on the deft's. part; for the law will not permit a man to be convicted of perjury, unless there are two witnesses at least. It is the province of the grand jury to judge of the intention. Crown C. C.  
597.  
  
1 Bro. Ch. R.  
419 —  
Crown C. C.  
625, 626.

§ 14. An indictment will not lie where the supposed perjury depends on the construction of a deed. It is perjury, though the false oath be not taken in the face of the court, but before persons authorized by it to examine a matter, a knowledge of which is necessary for a right decision of the suit. Hence, a false oath before the sheriff on a writ of inquiry of damages is perjury.

§ 15. So any false oath is perjury which tends to mislead



CH. 210. the court in any of their proceedings relating to a matter judicially before them, though it no way affect the principal judgment which is to be given in the cause, as if one who is bail swear he is worth more than he is in fact.

Art. 5.

4 Com. D.  
640, 641.

ART. 5. *Indictments &c.* § 1. *Perjury* is indictable at common law. The indictment ought to state the perjury was committed voluntarily. It ought to shew the exact breach. And if the perjury be at a trial, the indictment must shew what the issue was, and how the evidence tended to the issue; and it must state a legal authority to administer the oath; (Dougl. 156; 1 D. & E. 69;) must allege *time* and *place*, if material, 70. Judgment is not given unless the party be present in court. But see our statutes, above cited.

1 Dougl. 156,  
Rex v. Lyme  
Regis.  
5 D. & E. 311,  
320. Rex v.  
Dowlin, the  
indictment.

§ 2. It is not necessary, in an indictment for perjury, to state a legal authority to administer an oath.

§ 3. In an indictment for this offence, it is necessary to state only so much of the proceedings of the former trial as will shew the materiality of the question on which the perjury is assigned; but it is sufficient to allege generally, that the particular part became a material one. And if this is wanting, it is a material objection. But the reason of Lord Kenyon was, on 23 Geo. II. c. 11, similar to our act of Congress on this subject, above cited; that requires only the substance of the offence to be stated; therefore it is not necessary to state, in the indictment, any more than the substance of the offence charged, and by what court, or before whom the oath was taken, aver the court &c. had competent authority, &c. and the commission or power of the court need not be specially stated. But if the prosecutor, in perjury, undertakes to state in the indictment more of the proceedings than necessary on said act of 23 Geo. II., he must state them correctly, or he fails. Further stating, that at an admiralty session, J. Kimber was tried in due form of law, on a certain indictment, then and there pending against him for murder, and that at and on that trial, it then and there became and was a material question, whether the said deft. had ever said that he would be revenged of the said J. Kimber, and would work his, said J. K's, ruin, are sufficient averments that the perjury was committed on J. K's trial for murder, and that the question on which the perjury was assigned, was material on that trial.

1 D. & E. 69,  
Rex v. Aytell.

§ 4. A solicitor made his complaint *ore tenus* before the chancellor, in the court of chancery, that he was arrested returning home, after hearing the cause; the indictment stated, that "at and upon the hearing of the said complaint," the deft. deposed &c. Held, this was a sufficient averment the complaint was made. The deft. was discharged, because

Cro. El. 137,  
Stedman's  
case.

the indictment did not state in what matter he swore falsely, nor in what action &c. CH. 210.  
Art. 5.

§ 5. Many forms of indictments for perjury, and subornation of perjury ; many of them at common law ; each stating the proceedings at length, in the causes in which the perjury was committed. Crown C. C.  
665 to 688.

§ 6. It is said a man may be as much guilty of perjury, by a false oath tending to extenuate or aggravate the damages, as by an oath direct to the point in issue ; which might have induced the drawers of indictments for perjury formerly to set out the whole of the pleadings in which the issues were joined, in order to shew the extent and certainty of the damages which the plts. claimed ; but as the greater stress appears to be laid on the intention to pervert the due course of the law, it seems sufficient to state in the indictment that a matter cognizable in court came duly before the judge and jury, to be tried within the intention of 23 Geo. II., (like our act of Congress.) It is necessary to state in the indictment the question was material. Crown C. C.  
627, 628,  
cites 1 Haw.  
176.

§ 7. Settled, justices of the peace have no jurisdiction over perjury at common law, but have under the statute of 5 Eliz. ; not adopted in Massachusetts, because very early the Colony legislature adopted an act on this subject.

§ 8. The thing sworn ought to be some way material, and be so stated in the indictment for perjury ; for if it be wholly immaterial and foreign to the purpose, no way pertinent to the matter in question, nor tending to increase or decrease the damages, nor like to induce the jury to give the readier credit to the substantial part of the evidence, it cannot be perjury, because it is wholly idle and insignificant. As where a witness introduces his testimony with an impertinent preamble of a story, concerning previous facts, no way relating to what is material, and is guilty of a falsity as to such facts. But it seems a reasonable opinion, that a witness may be guilty of perjury in respect to a false oath concerning a mere circumstance, if such oath have a plain tendency to corroborate the more material part of the evidence. As if, in trespass for spoiling the plt's. close with the deft's. sheep, a witness swears he saw such a number of the deft's. sheep in the close, and being asked how he knew them to be the deft's., swears that he knew them by such a mark, which he knew to be the deft's., when, in truth, the deft. never used any such mark. An indictment, at common law, for perjury in an affidavit, sworn before the court, need not state the affidavit was filed of record. 3 Bac. Abr.  
816, cites  
Haw P. C.  
175.—M'Nal.  
ly, 437, 438.  
  
7 D. & E.315.

CH. 210. ART. 6. *Piracy.*

## Art. 6.

Co. Lit. 391.  
—3 Inst. 112,  
113.—Mod.  
766.—Hale's  
P.C. 77, 334—  
East, C. L.  
792 to 812.—  
1 Haw. c. 37.

§ 1. *Common law.* This did not notice piracy as a felony, or take any cognizance of it. "And piracy, though a felony, was only punishable by the *civil* law, before 28 H. VIII. c. 15; and attainder thereof, by the course of the *civil* law, does not corrupt the blood, but an attainder by force of the statute does. A pardon of all felonies, does not discharge piracy, because it was a felony where the common law took no consuance; and the said statute did not alter the offence, but only ordained a new way of trial, and a new punishment.

4 Bl. Com. 71,  
73.—Rex v.  
Dawson, 5  
State Trials, 1,  
ed. 1742, pi-  
racy is robbery com-  
mitted within  
the admiralty  
jurisdiction.  
Valens on  
Prizes, p. 29.  
—2 Hale's P.  
C. 18.—Dr.  
Brown's Civ.  
& Adm. law,  
461, 462, says  
piracy is un-  
authorized  
depredation  
at sea.

§ 2. A pirate "*is a robber at sea,*" is deemed an enemy of mankind, and every community has a right to punish him. It is held to be only felony; and the special court established by 28 H. VIII. c. 15, for trying piracy proceeds according to the common law. Piracy is an act of robbery and depredation on the high seas, which if committed on land would be a felony, by the common law; but by statute some other offences are made piracy. By 11 and 12 of W. III. c. 7, an act of one subject against other subjects, on the seas, under colour of a commission from a foreign power, which would be only an act of war in an alien, shall be construed piracy in a subject. The common law does not take cognizance of piracy. Hence if one, at land, be accessory to a piracy at sea, the commissioners on the statute cannot try him; for his offence was at land; nor can the common law try it, because piracy is not made felony whereof the common law can take notice. Again, if A commits a robbery at sea, and brings the goods to land within the body of the county, this is not felony, triable by the common law, because the common law takes no notice of the original fact.

Constitution  
of the United  
States. In-  
dictment for,  
Cro. C. C.  
639 to 645.—  
4 Wentw. 50,  
51.

ART. 7. § 1. By art. 1, s. 8, of the constitution, Congress has power to define and punish "piracies and felonies, committed on the high seas, and offences against the law of nations." By article 3, s. 2, the federal judicial power is extended, "to all cases of admiralty and maritime jurisdiction." "And when a crime shall not be committed within any State, the trial shall be at such place or places as Congress by law shall have directed."

Act of Con.  
April 30,  
1790, sec. 9  
to 12.—[And  
act of Con.  
Mar. 3, 1819.]

§ 2. Section 8, of this act, enacts, "that if any person or persons shall commit, upon the high seas, or in any river, haven, bason, or bay, out of the jurisdiction of any particular state, murder or robbery, or any other offence, which if committed within the body of a county, would, by the laws of the United States, be punishable with death; or if any captain, or mariner, of any ship or other vessel, shall piratically and feloniously run away with such ship or vessel, or any goods or merchandize to the amount of \$50, or yield up such ship or

vessel, voluntarily, to any pirate; or if any seaman shall lay violent hands on his commander, thereby to hinder or prevent his fighting in defence of his ship or goods committed to his trust, or shall make a revolt in the ship," every such offender shall be deemed a pirate and felon, and suffer death; and for offences committed on the high seas, or out of the jurisdiction of any State, the offender may be tried where apprehended, or first brought in. Here is no distinction as to native or foreign ships.

CH. 210.  
Art. 7.

§ 3. Section 9 enacts, "that if any citizen shall commit any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof, upon the high sea, under colour of any commission from any foreign prince or state, or on pretence of authority from any person," such offender shall be deemed a pirate, felon, and robber, and suffer death. This section respects citizens only.

§ 4. Section 10 enacts, that any person advising &c. said murder, robbery, or other piracy aforesaid, on the seas, which shall affect the life of such person, (pirate,) and the piracy be in fact committed, the adviser shall be deemed an accessory before the fact, and, on conviction, suffer death.

Section 11 enacts, that he who receives a pirate, his goods or vessel, knowingly, is deemed accessory after the fact, and shall be imprisoned not exceeding three years, and fined not exceeding \$500.

§ 5. Section 12 enacts, that if any seaman, or other person shall commit *manslaughter* on the high seas, or confederate, or attempt, or endeavour to corrupt any commander, master, officer, or mariner, to yield up, or run away with, any ship or vessel, or with any goods, wares, or merchandise, or to turn pirate, or to go over to, or confederate with, pirates &c., punishment is imprisonment not exceeding three years, and fine not exceeding \$1000. This section respects *any person* offending, and does not confound manslaughter with piracy.

§ 6. Section 2 of this act enacts, that nothing in the foregoing act shall be construed to prevent the prosecution or punishment of treason, or any piracy, defined by treaty or other law of the United States." Clause in the act of June 5, 1794, cited Ch. 200, a. 6.

Act of Congress  
June 14,  
1797.

Held, robbery committed at sea is piracy, under said 8th section of the said act of 1790, though such robbery if committed on land would not, by the laws of the United States, be punishable with death; and that the crime of robbery, as mentioned in said act, "is the crime of robbery as recognized and defined at common law;" and that the Circuit Courts of the United States have jurisdiction thereof. Also the crime of robbery, committed by any person on the high seas, on board

3 Wheaton's  
R. 642, 643,  
U. States v.  
Palmer.

**CH. 210.** of any vessel belonging exclusively to subjects of a foreign state, on persons in a vessel so exclusively foreign, is not piracy within said act; nor punishable in the courts of the United States;—also if a colony revolt from the parent state, and declares itself independent, and a civil war rages between them, the courts of the Union must view such colony as it is viewed by Congress and the president. If the United States remain neutral and recognise the civil war, the courts of the Union cannot consider as criminal, those acts of hostility which war authorizes, and which the new government may direct against its enemy.” And generally the same evidence applies to it as to an acknowledged state, to prove a vessel or person is in the service of such new state &c.—Wheaton, 52, 73.

**Art. 8.**

**Mass. Colony law, 1673.**

**ART. 8.** *Massachusetts statutes as to piracy.*

§ 1. By this statute piracy in harbours or at sea, by piratically seizing a vessel or rising on the master, was punished with death.

**Mass. Act, 1696.**

§ 2. By this act it was enacted, that “all treasons, felonies, robberies, murders, and confederacies, hereafter to be committed in or upon the sea, shall be inquired, tried, heard, determined, and judged, in such counties and places as shall be limited by commission or commissions from the governor” &c. with the advice of counsel, “to be indicted for the same in like manner and form as if such offence or offences had been committed or done in or upon the land;—such commissions to be under the Province seal, directed to three or more substantial persons &c. “to hear and determine such offences after the common course of the laws of this Province used for treasons, felonies, robberies, murders, and confederacies, done and committed upon the land within the same,” to be inquired of by jury;—like process as for such offences done on land;—saving for persons compelled by necessity &c.;—suspected persons to be seized and secured;—officers to be aided in making seizures;—and private armed vessels to bring their prizes into some of the British ports for adjudication, according to their instructions, on penalty for neglect, of being prosecuted as robbers and felons, and as if not commissioned. This act continued in force until the American revolution, by reason of which it ceased to operate.

There were similar laws necessarily in the other Colonies, respecting piracies, murders, treasons, &c. on the seas. In some cases, and at some periods, the king appointed the courts to try such offenders, and in some of the Colonies without a jury. The above act of 1696 seems to have been framed on the 28 Hen. VIII. c. 15, as to treasons &c. on the sea, except as to the forfeitures,—and to give it effect in the Colony, that not being in existence when the 28 Hen. VIII.

was enacted, it was no doubt sanctioned by the parent state, CH. 210.  
as it respected crimes committed on the *high seas*, and tea- Art. 9.  
sons &c.

ART. 9. *What is piracy or not.*

§ 1. Piracy is when a man "commits a robbery upon the sea." As if by violence one seize a ship or the goods of another upon the sea, putting him in fear; though the person robbed be the subject of a foreign prince or state in amity, or the person who robs has a commission from a foreign prince, if he who is robbed is not an enemy to such prince. But it will not be piracy if the subjects of a prince, in enmity with another, take upon the sea, by force, the goods of the other enemy; and though taken and carried into a neutral state. Nor is it piracy if he who loses his goods is in enmity with the prince or power giving the commission to him who seizes them;—nor though a subject of the English king took his commission from a foreign prince without license, which is not lawful;—nor though the person taken, be a friend, if brought without damage to the port of such prince for adjudication;—nor is it piracy if the taking be within a cinque port &c., for this is felony, triable at common law, whenever the taking is within the body of the county.

1 Com. D.  
370, 371, &c.  
—3 Inst. 113.  
—2 Woodes.  
422.—See a.  
7, s. 6.—3  
Inst. 154.—1  
Rol. 175.—  
Grotius, De  
Jure B. ac P.  
lib. 3. c. 3. c.  
9. c. 13.

§ 2. By the law of nations, the taking of goods by piracy, does not alter the property;—and so it is by the law of Spain: and, therefore, when goods taken by pirates are brought to England, the owner may take them. See Grotius, *pirata et latrones*.

Grot. de J. B.  
ac P. lib. 3. c.  
9. s. 16; &  
1 Rol. 285.—  
See Azuni,  
part 2, c. 5.

§ 3. And all other felonies upon the sea are within the jurisdiction of the admiralty; as cutting out tongues, putting out eyes, sodomy, rape, larceny, &c.; but this must be independent of any statute; and originally triable by the civil law, by which the offender could not be convicted or executed without confession, or express testimony. See Martens on Captures &c. as to piracy.

3 Inst. 111.—  
Rutherford,  
p. 481 &c. as  
to piracies.

§ 4. The Colony acts did not, any more than the 28 Hen. VIII. c. 15, alter the nature of the offence, but it remained to be determined by the civil law: they, like that, only altered the manner of the trial and of the punishment. And this is the case on the act of Congress: what is piracy or not must be ascertained and decided by the rules of the civil law; and by that law piracies and depredations at sea are capital offences. But the 28 Hen. VIII. c. 15, altered the law as to the manner of proof; that by the civil law being inconvenient, "because by that law no offender shall have judgment of death without his own confession, or direct proof by eye-witnesses."

3 Inst. 112.—  
2 Hale's P.  
C. 370.—  
Staunf. P. C.  
10.—3 Bac.  
819.—28  
Hen. VIII. c.  
15.—Moore,  
766.

§ 5. The indictment for piracy must allege the fact to be done on the sea, and have both the words, *felonice* and *piratice*.

3 Bac. Abr.  
820.

CH. 210. § 6. The high seas are public high-ways, where all nations

Art. 9. have equal rights and authority; and therefore every nation has a right to seize a pirate, *hostis humani generis*, on these seas, and bring him to punishment, whether he be native or alien, Christian or infidel, Turk or pagan, if he be not an enemy in lawful war with the country of the party seizing him as a pirate. But our act of Congress of 1790 extends so far. See the United States v. Palmer, a. 7, s. 6, above.

1 Haw. P. C. 267.—See Ch. 186, a. 11, as to the meaning of high seas.

Wheaton on Captures, 64, 237.

§ 7. Taking by pirates has none of the effects of legal capture; it does not divest the actual owner of the property. So was the civil law. But taking by pirates is unlike a capture made by captors not commissioned; see Captures. If a recapture be made from a pirate, the property ought to be restored to the owner, paying a reasonable salvage; his property is not divested. The quantity of salvage depends on local laws and usages.

East's C. L. 796, Rex v. May & al.

Masson's case.

§ 8. Several mariners on board an English ship lying at the Groyne, seized the captain, and put him on shore, and then carried away the ship, and committed several piracies; held, piracy, for this force on him, and carrying away the ship, was explained by their after conduct. But where a master of a vessel loaded goods on board at Rotterdam, consigned to Malaga, and insured them, run them on shore in England and burnt the ship, to defraud the owners and insurers, held, not piracy, but a breach of trust.

United States v. Klintoeh, 5 Wheaton, 144, 163; deft. was a citizen of the United States.

§ 9. The deft. was indicted for piracy on the high-seas; held, 1. A commission issued by Aury as "Brigadier of the Mexican Republic," (unknown to our laws) or as "*generalissimo* of the Floridas," then a Spanish Province, did not authorize armed vessels to make captures at sea: 2. Whatever the commission was, it did not exempt from piracy a seizure made *animo furandi*, and not *jure belli*: 3. The said act of Congress of April 30, 1790, extends to all persons on board all vessels that throw off their national character, by cruising piratically, and committing piracy on other vessels. This piracy was committed on a vessel belonging to persons unknown to the jurors, and the deft. got possession of her by practising fraud, and he cruised in a vessel owned not by a foreign power, but by men acting in defiance of all law, and acknowledging no government.

United States v. Smith, 5 Wheaton, 148, 183.

§ 10 The deft. was indicted for piracy; held, 1. The act of Congress of March 3, 1814, referring to the law of nations for a definition of piracy, is constitutional: 2. Piracy is defined by that law with reasonable certainty: 3. "Robbery, or forcible depredation upon the sea, *animo furandi*, is piracy" by that law, and by the act of Congress. The deft. and others had belonged to a private armed vessel commissioned

by the government of Buenos Ayres, abandoned her, seized by force another vessel, went to sea in her without any commission or authority, and seized a Spanish vessel, which was the act of piracy. Piracy is "*robbery upon the sea.*" Livingston J. dissented; he thought Congress had not constitutionally exercised the power of defining piracy. See in about 18 pages of notes in this case, many definitions of piracy in different languages.

CH. 210.  
Art. 9.

§ 11. The five defts. were indicted in seven indictments for piracy; held, 1. The 8 sect. of said act, April 30, 1790, is not repealed by the said act of March 3, 1819: 2. On said act of 1790, it is not necessary to allege in the indictment the deft. is a citizen of the United States: nor 3. The vessel he acts in belongs to a citizen of them: 4. If a citizen of them fit out a vessel in a port of them, to cruise against a power in amity with them, he is not protected by a commission from a belligerent, from punishment for any offence committed against vessels of the United States: 5. The jury may find a piracy committed on the high seas, on evidence it was committed in an open roadstead, on a vessel at anchor within a marine league of the shore at the island of Bonavista: 6. *Particular State* in said act of 1790, means one of the States of the Union: 7. A vessel by assuming a piratical character loses her national character: 8. And a jury may find this character on any evidence that satisfies them: 9. Each count in an indictment is a substantive charge, and the verdict may rest on one good count.

United States  
v. Furlong &  
al. seven in-  
dictments,  
5 Wheaton,  
184, 204; or  
United States  
v. Pirates.—  
United States  
v. Griffin & al.  
—Same v.  
Bowers & al.


In this case the piracy was committed on a vessel and crew all English; the piratical vessel was a vessel of the United States, and run away with by the master and crew. Furlong *alias* Hobson was an Irishman, a British subject;—was a motion in arrest &c. As soon as men act piratically they lose their national character;—so held.

If a murder be committed by one foreigner on a another, and both being on board a foreign vessel at sea, the United States courts have not jurisdiction of the case, p. 195;—otherwise, if the offending vessel be American;—not otherwise, if she lose her national character, and become piratical.

§ 12. The defts. were indicted for piracy and murder; held, 1. The courts of the United States have jurisdiction under the said act of 1790, of murder or robbery committed on the high seas, though on board a vessel held by pirates, and belonging to no nation, and sailing unlawfully, and not under the flag of any foreign nation: 2. So of the crime committed on board of a foreign vessel by a citizen of the United States; or on board a United States' vessel by a

United States  
v. Holmes &  
al., 5 Wheat-  
on, 412.



Сн. 210. Art. 9.  foreigner, or by a citizen or a foreigner on board of a piratical vessel: 3. It makes no difference whether the offence be committed on board of a vessel or in the sea, as by drowning him, or shooting him when in the sea, though not thrown overboard. The indictment at large is for *piratical murder*; in fact, the crime was a murder by pirates; and the indictment concludes, against the peace and dignity of the United States. This was correct, viewing the crime as merely murder; not viewing it as a piracy, for that is against the peace &c. of all nations. I find nothing in the books defining piratical murder. This confounding of crimes has probably grown out of said act of 1790, which too much confounds murder and piracy.

§ 13. *Note.*—All the definitions of piracy may be reduced to two short ones: 1. That of the Roman or civil law, which describes a pirate to be *hostis humani generis*; that is, *the enemy of mankind*: 2. That of the common law, which describes him as being a robber on the sea, adopted in the cases of Palmer and Smith. The definitions are easily and universally understood; whereas those verbose definitions of piracy given by Grotius and some others, rather obscure the subject. *Enemy of mankind*, means *all mankind*; and the true definition of a pirate excludes all national character. To allow him the character of a citizen or foreigner, is to suppose he remains the member of a nation; whereas, when a man becomes a pirate, he throws off his national character, and his vessel loses hers; and so it has been often decided; and every nation has a right to punish him. This very right implies he is of no nation, as does his being *hostis humani generis*. In piracy alone it is enough he is a pirate, and we need not enquire if he be a citizen or a foreigner. But in cases of treason, murder, or manslaughter at sea, the case is different; a traitor or murderer, merely as such, though at sea, is not punishable by every nation; for treason he can be punished only by the nation to which he owes allegiance. And one of the same American crew may murder another of it at sea,—the murderer is not therefore *hostis humani generis*, to be punished by every nation.

## CHAPTER CCXI.

RIOTS, ROUTS, AND UNLAWFUL ASSEMBLIES, SCHOOLS, SLAVE  
TRADE, &c. TRESPASS.

ART. 1. *Riots &c. what.*

§ 1. "In unlawful assemblies there must be three or more persons concerned : 1. An unlawful assembly is where three or more do assemble themselves together to do an unlawful act, as to pull down enclosures &c. and part without doing it or making any motion towards it : 2. A *rout* is where three or more meet to do an unlawful act upon a common quarrel, as forcibly breaking down fences, upon a right claimed, of common, or of way, and make some advances towards it : 3. A *riot* is where three or more actually do an unlawful act of violence, with or without a common cause or quarrel." The punishment of these assemblies is by fine and imprisonment by the common law, and in very enormous cases the pillory is sometimes added.

4 Bl. Com.  
146.—Indict-  
ments, 4  
Went. 305,  
314.—Cro. C.  
C. 669, 682.

§ 2. An unlawful act to be done is necessary to make a riot. If three or more assemble lawfully, and quarrelling fall on one of their own number, it is not a riot. If they fall on a stranger, it is a riot, but only in those who concur. In riots, routs, and unlawful assemblies, as well as in cases of other offences, officers may require aid.

2 Salk. 694,  
Queen v.  
Soley & al. ;  
596, Queen v.  
Ellis.

§ 3. A number of persons met together on a lawful occasion, and in a lawful manner, as to elect an officer &c., and during the assembly a sudden affray arose ; held, this did not make it a riot *ab initio*, but it was only a common affray. But also held, if a number of men assemble in a riotous manner to do an unlawful act, and a person who was on the place before upon a lawful occasion, and not privy to their first design, comes and joins them, he will be guilty of a riot equally with the rest.

2 Ld. Raym.  
966.

§ 4. Five persons were indicted for a riot and assault, the jury acquitted all but two. Morton moved in arrest of judgment, and insisted this was an acquittal of all, because two cannot make a riot ; two of the defts. were not acquitted, but were dead before the trial ; two found guilty. The court intended evidence was given against them all, as after a verdict the court will suppose every thing in order to support it ; as if the indictment had been laid, together with other persons unknown, in which case it has been held good, *Rex v. Moor & Kinnersley*, Stra. 193 ; that if two only are found guilty, yet the verdict implies that a riot was committed by the as-

1 W. Bl. 291,  
350, The  
King v. Scott

CH. 211. sistance of some of the unknown persons. So here, as two of  
 Art. 1. the defts. were dead and the verdict finds two others guilty of  
 the riot, the court will intend that the jury had evidence that  
 one at least of the dead men was concerned in it.

10 Mass R.  
 518, Com-  
 monwealth v.  
 Runnels & al.

§ 5. The disturbances of our numerous and frequent elec-  
 tions by riotous proceedings are of material importance, and a  
 remedy by indictment at common law for a riot is a remedy  
 that will generally apply to such disturbances. This remedy  
 we see applied in the following case well explained in the  
 form of the indictment and points decided thereon. This and  
 the Commonwealth v. Silsby, two cases at common law, seem  
 to afford remedies for nearly all illegal proceedings at elections.  
 This was an indictment for a riot, charging that Runnels with  
 five others named, with a great number, fifty or more, to  
 the jurors unknown, on (April 6, 1812, first Monday in April,) with force and arms at said Salem &c., unlawfully, riotously,  
 and routously, did assemble and gather together to disturb the  
 peace of the Commonwealth, and being so assembled and gath-  
 ered together, unlawfully, riotously, and routously, with shouts  
 and huzzas, did then and there rush into the public town-  
 house, or court-house, wherein the citizens being the legal voters  
 in the said town, were then and there constitutionally and legally  
 assembled in town meeting for the purpose of giving in their  
 votes for governor, &c. at which meeting Samuel Ropes & al.  
 being selectmen of said town of S., then and there presided,  
 and were then and there receiving the votes of the legal voters  
 of the said town of Salem for the officers aforesaid; and be-  
 ing so entered, they the said Runnels & al. with the other  
 persons to the jurors unknown, unlawfully, &c. with great  
 noise and tumult did attempt to seize the boxes in which the  
 votes of the qualified citizens were deposited, and did then  
 and there impede and obstruct the said Ropes & al. select-  
 men as aforesaid, in the discharge of their duties in their office  
 aforesaid for a long time, to wit, two hours, to the great dam-  
 age of the said selectmen in derogation of the free rights of  
 suffrage of the legal voters of said town of Salem, against the  
 peace of &c., and laws of the same.

On motion in arrest of judgment: held, 1. The words,  
*force and arms*, introduced in the first part of the indictment,  
 may well be applied to every distinct allegation in it: 2. The  
 words, *in terror of the people*, are not always necessary; as  
 "it is clear there may be a riot without terrifying any body;"  
 also, Holt's distinction, who said, that in indictments for going  
 about armed &c. *without committing any act*, these words are  
 necessary, because the offence consists in terrifying the pub-  
 lic; but in those riots in which an unlawful act is committed  
 the words are useless: 3. The facts charged in this indict-

11 Mod. 116.

ment amount to a riot, and an aggravated one. "To disturb another in the enjoyment of a lawful right is a trespass; and if it is done by numbers unlawfully combined, the same act is a riot." CH. 211.  
Art. 2.

There is no statute of the United States on this subject; and there were no words in this indictment grounding it on any statute.

ART. 2. *Massachusetts statute.*

§ 1. This enacts "that if any persons to the number of twelve or more, being armed with clubs or other weapons, or if any number of persons, consisting of thirty or more, shall be unlawfully, riotously, riotously, or tumultuously assembled, any justice of the peace, sheriff, or deputy-sheriff of the county, or constable of the town, shall, among the rioters, or as near to them as he can safely come, command silence while proclamation is making, and shall openly make proclamation in these or like words;" then follows the form of the proclamation; and if they disperse not in one hour after proclamation made or attempted to be made, the officer may command sufficient aid and shall seize them, who shall be had before a justice of the peace, and such officer may require a sufficient number of people in arms, if the rioters or any of them appeared armed, and if any of the rioters by their resistance be killed the officers and assistants are held guiltless.

Mass. Act,  
Oct. 28, 1786.  
—Maine Act,  
ch. 17.—  
Ken. Act,  
Dec. 19,  
1801, s. 32.

§ 2. Also enacts, that if any person refuses such assistance he forfeits not more than £10, nor less than £2, to the Commonwealth, which may be recovered on indictment or information as it is to the Commonwealth. Also enacts, the forfeiture of lands, tenements, goods, and chattels to the Commonwealth, for such rioters to remain together the said hour, riotously, or to oppose a known officer making said proclamation, whipped thirty-nine stripes, imprisoned not more than twelve nor less than six months &c. Same penalty for pulling down any building, provided the court may abate the whipping or any part thereof. Offences to be prosecuted in twelve months; the act to be read at the annual town meetings and opening each Court of Sessions.

§ 3. The above act is the act of 1751, revised in substance with small variations, and this act of 1751 was a revision of prior riot acts, passed in the Province and Colony. February 1787, an act was passed the more speedily and effectually to suppress tumults and insurrections in the Commonwealth.

Mass. Act,  
1751.  
Mass. Act,  
Feb 20,  
1787.—Maine  
Act, ch. 17.

ART. 3. *The indictment* in this case is generally at common law, as was that above against Runnels and others.

§ 1. Are several forms of indictments at common law, as for riot and assault; riot, assault, and imprisonment, and if

Crown C. C.  
669, 682.  
Informations  
376 to 407.

for riots and obstructing public officers in doing their duty, 4 Went.

CH. 211. two counts, the grand jury may return a true bill as to one, and *ignoramus* as to the other. Cowp. 325. And in this indictment for a riot there may be a count for a common assault.

Art. 4. So in an indictment for a riot committed by several footmen at a play-house, and breaking the lamps, may be joined a count for a general assembly with arms and making a riot; and indictment for a riot and attempt to rescue persons arrested &c.

1 Hawk. 160. § 2. Women, it is said, may be punished as rioters; but minors under fourteen years of age are not punishable for a riot.

2 Ld. Raym. 1210, The Queen v. Galston. § 3. In an indictment for a riot it must be explicitly shewn for what act the rioters assembled. It is insufficient to state they assembled to do some unlawful act; but the identical act must be stated in order that the defts. may have notice to apply their defence.

§ 4. *Insurrections.* By the constitution of the United States, art. 1, s. 8, Congress has power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions." By Massachusetts constitution, ch. 2, art. 7, the governor has power to employ the military force to the same purpose, and to suppress any rebellion declared by the legislature to exist. The word, *rebellion*, and laws respecting insurrections and rebellions, hardly have place in our code. In the French Penal Code, art. 209 to 221, rebellion is defined, and is deemed a crime or an offence according to the circumstances of the case; and rebellion committed by more than twenty persons armed, is punished by hard labour for a limited time, and if not armed, by confinement;—and many other provisions making the written law nearly complete on the subject. We find almost as little in the English law books concerning rebellion as we find in our own.

§ 5. But another French law against associations merits attention as a very arbitrary one. Penal Code, art. 291, 294, by this, no association of more than twenty families is allowed to meet daily or on appointed days, "for religious, literary, political, or other objects or purposes," without special license of government, and under such conditions as it may impose.

ART. 4. *Schools.*

Mass. Colony Laws, 186.

§ 1. Not to keep and maintain the schools required by law, in Massachusetts has ever been an indictable offence. As early as 1647, an act was passed enjoining and requiring every town of fifty householders to keep a school to teach writing and reading; and every town of 100 families or householders to keep and maintain a grammar school, so as to fit youth for the University, on penalty of £5 for each year's neglect. In 1671, this penalty was made £10, as to a town

of 100 families. And by an act passed 1683, every town of 500 families or householders, two grammar schools and two writing schools, on penalty of £20 for each neglect.

CH. 211.  
Art. 4.

§ 2. This act was a mere revision of the acts above, except that of 1683;—penalty for neglect £10, on conviction, on complaint to the Sessions, to be applied to the support of schools in the same county where, in the opinion of the Sessions, most needed, to be levied on warrant from the Sessions, in proportion on the inhabitants of the defective town, like other public charges.

Mass. Act,  
1692.

§ 3. In this act it was recited, that divers towns did shamefully neglect to keep and maintain shools “to the nourishment of ignorance and irreligion,”—and the penalty for each neglect £20 a year, and in proportion for a longer or shorter time to the above use; and this act made it the duty of all grand jurors to present the breaches and neglect of these laws.

Mass. Act,  
1702.

§ 4. This act increased the penalty to £30 as to towns of 150 families, and to £40 as to towns of 200 families, and in proportion as to those of 250 or 300 families, to the same uses, and to be recovered as above;—towns were empowered by law, to raise school monies.

Mass. Act,  
1718.

§ 5. On these laws, if a town neglected to set up and maintain a school as required by them, the practice was to proceed against such town by indictment, which stated the town of ——— consisted of more than 200 &c. families or householders, and that the selectmen and inhabitants of it ought by law to set up a grammar school &c. in it, and to procure some discreet person of good conversation, well instructed in the tongues, to keep it, and make due provision for his support and maintenance;—yet, the selectmen and inhabitants of the town, neglecting their duty in this behalf at ———, have neglected and refused for ——— months last past to set up a grammar school &c. and to procure and maintain &c. against the peace and the laws, &c.

§ 6. This act of June 1789, was a revision of the above laws with some additions. This act requires every town, containing fifty families or householders, to be provided with “a schoolmaster or schoolmasters of good morals, to teach children to read and write, and to instruct them in the English language, as well as in arithmetic, orthography, and decent behaviour,” equal to six months in a year for one school;—each town of 100 families to keep such schools equal to one twelve months in each year;—each town of 150 families &c. such schools equal to six months in each year, and in addition a school “to instruct children in the English language,” equal to one school twelve months in each year;—and every town of 200 families or householders, to maintain a grammar master

Mass. Act,  
June 26,  
1789.—Maine  
Act, c. 117.—  
See Mass.  
Acts, Feb. 28  
1800; June  
23, 1802; of  
June 24,  
1811; of  
Feb. 28,  
1815; of  
June 13,  
1817.

**CH. 211.** "of good morals, well instructed in the Latin, Greek, and English languages," and in addition to "be provided with a schoolmaster or schoolmasters as above described, to instruct children in the English language, for such term of time as shall be equivalent to twelve months for each of said schools in one year."

§ 7. This act provided for dividing towns into school districts, and for instruction in schools on sound, moral, religious, and republican principles.

§ 8. Sect. 6 inflicts penalties nearly in the proportion above stated, on towns for neglecting to maintain these schools; the penalties may be recovered in the Supreme Judicial Court or Sessions, (now Common Pleas) and levied on warrants from either court, on the inhabitants of the deficient town or district, "in the same manner as other sums, for the use of the county;" to be paid into the county treasury, and be applied to such schools in the same county as the Sessions (Common Pleas) may direct &c. The particular mode of conviction is pointed out in the act; of course it will be by bill, plaint, or information, as mentioned in the act. But as all grand jurors are directed by this act diligently to "inquire, and presentment make of all breaches and neglects of this law;" convictions may be on such such presentments or on indictments according to former usages.

§ 9. Thus has existed by law this important school system. Since June 1789, some few acts, not very material, have been passed, to enforce the maintaining district schools in towns divided by their votes into school districts,—as one, Feb. 28, 1800,—another, June 23, 1802,—another, June 21, 1811,—another, Feb. 28, 1815,—and another, June 13, 1817. These offences against the laws, in neglecting to keep up and maintain these schools, have been matters of constant attention from the earliest settlement of the country, especially among all enlightened men.

§ 10. Indictments have been found, and informations have been often filed for breaches and neglects of these laws. But few legal questions have arisen in the construction of them; generally no question of fact can have arisen but as to the number of families or householders in a town, or as to the fact of neglect to keep the school required by law.

**ART. 5.** Some few questions of law of late years have arisen in regard to district schools, on the new districting principle, which follow.

§ 1. This was an indictment against the town of Northampton, for not providing schoolmasters, as required by said act of June 25, 1789. The indictment, after stating the offence, concluded,—which is in subversion of that diffusion of know-

ledge &c. ; held bad, because it did not conclude *contra formam statuti*, and this after a plea of *nolo contendere* had been received. Judgment arrested. CH. 211.  
Art. 6.

§ 2. In this case it was decided that monies voted to be raised by the inhabitants of a school district in a town, for the purpose of erecting a district school-house, may be assessed by assessors of the town chosen after such vote : 2. It is not necessary that such assessment be made within thirty days from the date of the certificate of the district clerk : 3. If an illegal assessment of such monies be made, the same or succeeding assessors may make a new assessment, for which purpose the district clerk may issue a new certificate : 4. The inhabitants of a school district having voted to raise monies for erecting a school-house, may afterwards, and before the same are assessed, rescind such vote at their discretion. 3 Mass. R.  
230, Pond v.  
Negus & al.

§ 3. In what manner towns may alter or make new school districts ; and how affected by setting off inhabitants, see Richardson jun. v. Dagget & al. Ch. 172, a. 6.

§ 4. Lands of a resident owner in any town occupied by his tenant, are taxable in the school district in which the tenant lives ; and lands in his own occupation in the school district in which the owner dwells ; notwithstanding the discretion vested in the assessors by the general tax act. 5 Mass. R.  
390, Pease  
jun. v. Whit-  
ney & al.

§ 5. Where one was assessed for lands lying in a school district, in which it was not legally taxable, but requested the assessors to place it to his account of taxable property, and informed them he was to be taxed for it ; held, the assessors were not liable in trespass for making such assessment. 13 Mass. R. 193, Fourth School District in Rumford v. Wood,—has corporate powers to maintain an action on a contract to build a school-house, and to make a lease of land to it. 8 Mass. R.  
93, Pease  
jun. v. Whit-  
ney & al.

ART. 6. *Slave-trade*. This trade is now become an offence against the laws of the United States, and of Massachusetts &c.

§ 1. The first act against the slave-trade we find in the Colonies, was passed by Massachusetts Colony legislature in 1646. This legislature, speaking with indignation of man-stealing and of the slave-trade, as odious and justly abhorred by all good and just men, ordered, “ that the negro interpreter, with others unlawfully taken, be, by the first opportunity, at the charge of the country for the present, sent to his native country, (Guinea,) and a letter with him, of the indignation of the court thereabouts, and justice thereof, desiring our honoured governor would please to put this order in execution.” Notwithstanding this just indignation, our ancestors afterwards clearly recognised negro-slavery. (See Ch. 53, Pauper cases.) Mass. Colony  
Laws, 53.

A statute in Kentucky, Toulmin's R. Laws, 304 to 314 ; the Virginia acts revised, as to slaves at large.



**CH. 211.** The other colonies early recognised negro-slavery, and continued to do it, so that in the census of 1790 &c. every State in the Union, except Massachusetts, returned slaves, meaning negro-slaves. But this State has not allowed of negro-slavery since 1780, for reasons mentioned in another place.

**Art. 6.**  
Territorial  
Constitution,  
July 13, 1787.

The first express constitutional provision against slavery, was introduced into the Territorial constitution, ordained by the Revolutionary Congress, July 13, 1787;—see Journals of Congress of that date, Graydon's Digest, Appendix, 137 to 141. By art. 6 of that ordinance it is provided, "there shall be neither slavery nor involuntary servitude in the said territory, otherwise than in punishment of crimes whereof the party shall have been duly convicted." Next followed the article in the Federal constitution, art. 1, s. 9, empowering Congress to tax the importation of slaves, to the amount of \$10 for each person, and after 1808 to prohibit such importations. The construction of the Maryland act, 6 Cranch, 3.

Act of Con-  
gress, April  
7, 1798.

§ 2. Sect. 7 of this act prohibited the importation into the Mississippi Territory, from any foreign port, any slave or slaves, on penalty of \$300 for each slave, and the slave to be free.

Act of Con-  
gress, Feb.  
28, 1808.

§ 3. This act prohibited the importation of slaves into any State which had prohibited the slave-trade; and a vessel concerned in this trade was denied an entry, and forfeited;—and a penalty of \$1000 for every negro, mulatto, or other person of colour imported as a slave. Not in force in the Territory of Orleans. 6 Cranch, 330.

Act of Con-  
gress, March  
2, 1807.

§ 4. This act, after Jan. 1, 1808, made it illegal to import or bring into the United States, or the territories thereof, from any foreign kingdom, place, or country, any negro, mulatto, or person of colour, with intent to hold, sell, or dispose of such negro, mulatto, or person of colour, as a slave, or to be held "to service or labour;" and every vessel fitted out or sent for the purpose is forfeited to the United States, and may be seized and condemned accordingly;—and every person concerned as as principal or aider in this business, by fitting vessels &c. for this trade, forfeits \$20,000, half to the United States and half to the prosecutor. And other large penalties were enacted by this act, to be inflicted on every person directly or indirectly concerned in the importation into the United States of any slaves, or in selling such imported &c.;—in some cases imprisonment from five to ten years, and fines from one to ten thousand dollars. This act was in its numerous and guarded provisions evidently intended to prohibit all traffic and servitude in the United States and their territories, in and by negroes, mulattoes, and persons of colour, except those in the United States and their territories,

Jan. 1, 1808; these, and these only the act left to be retained and sold as slaves. CH. 211.  
Art. 7.

§ 5. This act, for the government of Louisiana, also restrained slavery therein, on the principles above stated.

Act of Con.  
Mar. 26, 1804.

The great object of all these acts of Congress, respecting the United States and their numerous and extensive territories, and for limiting the slave trade, seems to have been to confine the number of slaves to those in the United States, and their territories, January 1, 1808, entirely, and to those in Louisiana, March 26, 1804, and to their natural increase, that is, to allow, in no form whatever, of any more importations of slaves into any part of the Federal territories, whether States, Districts, or Territories appropriately so called, either by land or water; and to make every importation, and every preparation for importation, contrary to these laws a *high misdemeanor*. And as there is reason to believe these laws in general have been well executed, we may fairly attribute to *natural population* the increase of slaves in our Federal dominions, since January 1, 1808.

§ 6. There have been but few decisions upon these statutes. In this suit it was held by the Supreme Court of the United States, that a prosecution on the act of Congress above stated, must be commenced in two years after the offence committed; and extended as well to penalties created after as before the act, and to debt for penalties as well as informations.

2 Cranch,  
336, Adams  
q. l. v. Wood.

§ 7. And in this case it was decided by the same court, that the question of the forfeiture of the vessel, under this statute, is a question of admiralty, and maritime jurisdiction.

2 Cranch,  
40, United  
States v. Sch.  
Sally.

§ 8. The United States, in exercising their legislative powers on this subject, seem to have confined themselves to the above cited provision in the constitution, that is, to the importation of slaves into the United States, and not into foreign countries or ports. Perhaps the general government has no power to do this, though it may punish their citizens for doing it. See late statutes to this purpose.

#### ART. 7. *State statutes as to the slave-trade.*

The individual States have enacted laws forbidding their citizens to be any way concerned in the slave-trade.

§ 1. By the first section of this act, the legislature of Massachusetts enacted, "that no citizen of this Commonwealth, or other person residing within the same, shall for himself, or any other person whatsoever, either as master, factor, supercargo, owner, or hirer, in whole or in part, of any vessel, directly or indirectly, import or transport, or buy or sell, or receive on board his or their vessel, with intent to cause to be imported or transported, any of the inhabitants of any state or kingdom, in that part of the world called *Africa*, as slaves,

Mass. Act,  
Mar. 26, 1798.  
—See act of  
Maine to protect  
personal liberty of the  
citizens, &c.  
ch. 22.—  
Toulmin's  
Kentucky  
Laws, p. 305,  
307.

CH. 211. or as servants for term of years; and that every citizen, inhabitant, or resident, as aforesaid, who shall directly or indirectly receive on board his or their vessel, with intent to import or transport, or cause to be imported or transported, any of the said inhabitants of Africa, contrary to the true intent and meaning of this act, and be thereof lawfully convicted," shall forfeit and pay £50, for every person by him or them so received on board, with intent to import or transport; and £200 for every vessel fitted out with intent to, and that shall actually, be employed in the importation or transportation aforesaid, to be recovered in an action of debt, half to the State and half to the informer.

Art. 8.

The same act makes all insurances on such vessels void. J. W. was prosecuted on this act.

Wilfully destroying ships, cargoes, &c., see the best act against such crimes, Maine statutes, Ch. 14; Mass. act, March 8, 1803.

#### ART. 8. *Kidnapping.*

The same act, section 3, enacts, that when any inhabitant or resident of this Commonwealth shall be carried off by force, or decoyed away, "it shall be lawful for any friend of such injured inhabitant or resident, to bring forward and prosecute to final judgment and execution," in any proper court, any action for damages against any such offender in the name of the injured party, giving bond to the judge of probate to pay the damages recovered to the injured party, on his return, or to the use of his family &c., as the judge shall direct. If the deft. be acquitted, he recovers costs, also reasonable damages.

Mass. C. & P. Laws, 50.—4  
Bl. Com. 219.

By Massachusetts Colony law of 1646, *kidnapping* or *man-stealing* was punished with death. So by the Jewish law. Same in the civil law, called in that *plagium*. But the common law punishes it (taking persons from one country and selling them in another,) with fine, imprisonment, and pillory. And notwithstanding the above special actions by friends, no doubt this is an indictable offence at common law, so punishable. Law of Kentucky, of December 19, 1801, from five to ten years' confinement in the penitentiary.

#### ART. 9. *Trespass.*

Indictment for breaking the close with violence, & taking cattle & sheep, 6 Wentw. 392, 394; 3 counts.

§ 1. It is a very nice question, *what is an indictable trespass*. That a trespass with actual force and violence, or with a strong hand, is indictable, is clear, as stated Ch. 204, a. 11, Forcible Entry; and Ch. 208, a. 8, a. 9, a. 12, *Rex v. Storr*, and *Rex v. Atkins*. On the other hand it is clear, a bare trespass, though laid *vi et armis*, is not an indictable trespass; see said cases. It is clear, every breach of the peace is indictable; but then, according to *Rex v. Storr*, 3 Burr.

1698, it is not a breach of the peace to enter one's yard, dig up the soil, and erect a shed there with force and arms, where no violence is charged, besides the common technical term of *vi et armis*. Hence *vi et armis*, or entry into one's land with force and arms, does not imply a breach of the peace; nor does entering and cutting grass, or a tree, or taking away a log, by the rule, 1701. *Rex v. Bathurst* was an indictment, and supported, for that B entered A's house, turned and kept him out with force and arms. This was a breach of the peace; and Lord Mansfield laid stress on its being a dwelling-house, and by three persons, though no violence stated but what the words *vi et armis* implied. Wilmot J. said, *Rex v. Storr* stood indifferent, whether indictable or not, "whereas it ought to appear upon the face of the indictment that it is indictable."

CH. 211.  
Art. 9.

§ 2. This was an indictment against Jopson and five others, charging that they and several others unknown, unlawfully assembled to disturb the peace; and being so assembled, the six defts., particularly named, with force and arms, at &c. the mine of black-lead of J. B. and J. S., did unlawfully break and enter, and sixty pounds of lead &c., of the goods and chattels of said J. B. and J. S., did unlawfully take and carry away, against the peace &c. The court refused to quash this indictment, on motion, and said the defts. might demur.

*Rex v. Jopson & al.*, 8 Burr. 1702.

§ 3. This was an indictment for (*vi et armis*) breaking and entering a close, and unlawfully and unjustly expelling the prosecutors, and keeping them out of possession. Objected, this was not an indictable trespass, but a mere trespass for a civil injury, a private not a public one; a mere entry into his close, and keeping him out of it.

8 Burr. 1781, *Rex v. Blake & fifteen others*.—8 D. & E. 634, *Rex v. Richards*.

§ 4. Court held it not an indictable offence. Wilmot J. said, no doubt an indictment lies, at common law, for a forcible entry. There is no such "actual force as implies a breach of the peace, and makes an indictable offence." The rule is, "it must appear on the face of the indictment to be an indictable offence." "The number of defts. makes no difference in itself; no riot or unlawful assembly," is charged.

M'Nally, 419, 420.

Yates J. concurred, and said, "there is no force or violence shewn upon the face of the indictment, to make it appear to be an actual force indictable." "Nor is any riot charged, or any unlawful assembly; therefore the mere number makes no difference." Indictment quashed by the whole court.

§ 5. Is a mere trespass, and not an indictable offence, to pull off the thatch of a man's house, he being in the peaceable possession of it. Indictment quashed.

8 Burr. 1706, *Rex v. Atkins*.

§ 6. If a man be indicted, that he stole, and it is not said

Crown C. C. 106.

CH. 211. *feloniously*, this indictment imports but a trespass, and the offender may be put to answer it as a trespass.

Art. 9.  
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 Mass. Act,  
 Nov. 23, 1785.  
 —Maine Act,  
 ch. 33.

§ 7. Sections 2 and 3, of this act, provide for the offences of wilfully destroying milestones and public monuments, and for committing trespasses, secretly in the night time, (as stated in a former chapter,) being indicted.

§ 8. So one may be indicted, at common law, for a trespass, for he, with force and arms, a glass window, belonging to A. B. situated in —, by violently throwing stones at and against it, maliciously, unlawfully, and injuriously, did break and destroy, &c.

Indictment  
 for throwing  
 down fence.

§ 9. Upon the same statute the deft. was indicted for throwing down fence in the night time. The grand jury presented, that he at —, on —, secretly in the night time, with force and arms, did throw down and open one rod of fence, belonging to and inclosing lands not his own, but the same rod of fence then belonged to and enclosed a certain close of J. L., situated in —, bounded —, containing four acres, and that the deft. then and there did leave the same rod of fence down and open, to the great injury of the said J. L. and to the evil example &c., against the peace, and the form of the statute &c. If it cannot be proved to have been done *secretly in the night time*, these words may be omitted, and then the indictment is applicable to such a trespass committed in the day time.

§ 10. On the same statute, there was a proceeding in trespass, for secretly taking fruit as in the subjoined note; which sufficiently shews the nature of the trespass, the arrest on suspicion, declared on oath, and the proceedings.\*

\* To J. B. Esq., one of the Justices of the Peace within and for the county of —.

Complains, on oath, A B, of —, in said county, mariner, that some person or persons, to him unknown, did on —, at —, with force and arms, take and carry away from his, the said A B's garden, situated in said —, two quarts of fruit; that he has good cause to suspect, and doth suspect, that C and D of —, aforesaid, minors, did take and carry away the said fruit, as aforesaid; that the said C and D had not, nor had either of them at that time, or at any time, any interest in the said garden or fruit, nor had they, or either of them, at any time, the consent of the said A B, the owner thereof, for their so taking and carrying away the said fruit; all which is against the form of the statute in that case made and provided, and against the peace of the Commonwealth, and to the damage of the said A B.

Wherefore he prays, that the said C and D may be apprehended, and held to answer the said complaint, and be further dealt with according to law.


Signed,

A B.

Essex, ss.—Received and sworn to on —, before me, J. B., justice of the peace.

Warrant to apprehend in common form; fined 5s. each, and committed; one evidence proving the fact.

For arrests on suspicion, see 1 Mass. laws, 169; 2 Hale's P. C. 89, 90, 109, 110.

§ 11. These acts, and such have long existed, to preserve and secure to owners their property in logs, masts, spars, and other timber, in certain cases, and in cord wood; these statutes inflict various penalties, for destroying or injuring this kind of property of others, in whole or in part; also for destroying the marks or evidences of such property, &c. **CH. 211.**  
**Art. 10.**  
  
 Mass. Acts of Feb. 22, 1794, & Feb. 17, 1819, & the acts of Maine of 1821, ch. 34.  
 Mass. acts of March 14, 1805; of February 28, 1807; of February 2, 1816; of February 9, 1818; of February 17, 1819; of February 18, 1819.

**ART. 10. Usury.**

§ 1. This, as a ground of civil action, has been already largely considered; what is *usury* or not, the history of it, &c. It here only remains to consider usury as an indictable offence. It is an offence against public trade. But usury is not an offence at common law, for that law did not fix the rate of interest, but this has depended, and does depend, on the statutes ascertaining and fixing the rate of interest.

§ 2. It has been decided, that an indictment for this offence of usury does not lie at the sessions; nor does any indictment on the English statutes; for the method the statute prescribes must be followed. **3 Salk. 188.—11 Mod. 174, Queen v. Dy.**

§ 3. The laws of the United States do not regulate legal interest of monies lent, but this matter is left to the State legislatures, except in Federal places, (yet few and small;) hence usury is not found in those laws. As each regulates and prescribes legal interest, each State declares what is usury, and of course punishes it, some by indictment, some by information, and some giving a penalty for it, recoverable by action of debt. **Indictment for usury, 2 Ld. Raym. 1114.—West, 216.—Co. Ent. 435.**

§ 4. When it is said usury is not an offence at common law, it is intended, no interest above a certain rate, as 6 per cent a year, for instance, is prescribed by law, and 8 is taken, can be usury by that law, for clear it is that it knew no rate of interest; but if any usury by the common law, it must be any interest at all. According to the church notions, in the dark ages, it might be usury to take any interest, even one tenth of of one per cent a year. But since the statutes were passed allowing legal interest, which, in this respect, repeal this common law that allowed none at all, it is clear there is no usury at common law, where such statutes exist. And as such have ever existed in Massachusetts, there never can have been here any usury by that law. English lawyers, and some English judges, speak of usury at common law; at least an indictment on that law for usury, and of late years, as in a case laid so as judgment could not be on the statute, the court gave judgment, at common law, fine and imprisonment. It is true, where an act done is forbidden by the stat- **6 Bac. Abr. 423.**

CH. 211.

Art. 10.



ute, it is an offence against it, punishable by the common law, where the statute prescribes no punishment, as in that the courts by means of the common law will give effect to the statute. But this is never the case where a statute creates a new offence, as taking above 6 per cent a year is, and *chalks out a specific remedy*, as do the statutes against usury. The authorities on this point are numerous and clear.

Mass. Act,  
Mar. 16, 1784.  
—Maine Act,  
ch. 19.—Vir.  
Col. 37.—  
Ken. Act, Jan.  
20, 1798.

§ 5. This act, cited in a former chapter, inflicts the penalty for usury, "the full value of the goods and monies or other things so lent;" that above 6 per cent &c., to be recovered by indictment, or action on the case, half to the State and half to the informer, and by statute, June 19, 1788, if not prosecuted by the informer in one year, all to the State. The action and nature of usury having been already sufficiently considered, it now only remains to attend to the indictment for the offence of usury. As no indictment usually lies in England for usury, but informations do, the English authorities will not be always to the purpose. Certain facts are always material to be alleged in an indictment for usury, in this manner. The jurors present, that C. D., at ———, on ———, did lend to E. F. the sum of \$1000, lawful money; and to secure the repayment thereof, with lawful interest for the same, to the said C. D. or his order, the said E. F. afterwards, to wit, on the same ——— day of ———, at ———, aforesaid, did give and deliver to the said C. D. a certain promissory note, subscribed by the said E. F., bearing date the day and year aforesaid, by which note the said E. F. did promise to pay to the said C. D., or his order, the said sum of \$1000, with lawful interest for the same, six months after the date of the same note. And the jurors aforesaid, upon the oath aforesaid, do further present, that the said C. D. afterwards, to wit, on ———, at ———, aforesaid, *unlawfully*, unjustly, and *corruptly*, did take and receive of and from the said E. F. the sum of \$60, lawful money, of his monies, for *the forbearing and giving day of payment* of the said \$1000, from ———, to ———, (about six months,) which sum so as aforesaid received and taken, by the said C. D., for the forbearing and giving day of payment, of said \$1000, from ———, to ———, did exceed the rate of \$6 for the *loan* of \$100 for a year, to the damage of the said E. F., *against the peace, and the form of the statute*, in that case made and provided, &c. The words underscored in this form are all *material*. For to constitute an indictable offence of *usury*, there must be a *loan*, to be *repaid*; the excess of interest, or usury, must be unlawfully and corruptly agreed for; it must be for forbearing and giving day of payment, and the excess of interest must be actually taken and received.

ART. 11. *Adjudged cases.*

CH. 211.

§ 1. This was an indictment for usury. Dorothy Smith, at ———, August 20, 3d of Anne, lent and advanced to Richard Jones £5, to be repaid to her on the 8th day of January, next following;—that the January 8th aforesaid, at ———, *unjustly and corruptly* received and had of said Jones, for said time, 12s. 6d., which sum exceeded six per cent a year; against the peace of &c., and against the form of the statute in such case made and provided. Plea, *not guilty*. Verdict, *guilty*. Fine, £15, treble the £5 lent. It will be observed in this case, the penalty adjudged was treble the sum fairly lent, and no notice, in assessing the fine, was taken of the 12s. 6d. afterwards *usuriously taken*. Our court adopted the same principle in King's case, November term, 1815. It adjudged the forfeiture, the \$900 fairly lent, and took no notice of the \$108, afterwards on this loan *usuriously* received, though the usury consisted entirely in this after receipt of the \$108. In this case he was indicted for usury on three loans made to Daniel Hayden. The indictment stated they were made at *Danvers*, in the county of Essex; and to secure repayment he and John Butterfield gave King their promissory notes, signed by them, dated &c.; and stated the usury to be afterwards in taking and receiving, unlawfully and corruptly, \$108, for a year's forbearance, which was 12 per cent. Count, in the indictment on each loan and note, and each taking, &c. As the year was expired, and the whole penalty was claimed to the use of the State, Hayden and Butterfield were admitted witnesses for it. Verdict, *guilty*. Motion by the deft. for a new trial, filed: 1. Because &c.: 2. Because there is a material variance between the several contracts stated in the said indictment and the said several contracts produced and proved in each case, especially in this; each contract is stated in the said indictment to be joint only, not payable to order, and made at Danvers, in the county of Essex; whereas each contract produced and proved was and is *joint and several, payable to order*, and made at Chelmsford, in the county of Middlesex: 3. Because in each count in the said indictment the forbearance on each contract is said to have been to the said Hayden alone, and in no case to the said Butterfield.

Art. 11.  
3 Ld. Raym.  
49, 52,  
Smith's case.

Mass. S. J.  
Court Essex,  
Nov. 1815,  
Common-  
wealth v.  
Zachariah  
King.

To get over this objection of variance, the attorney general suggested, that all the parts of the indictment relating to the notes might be rejected as *surplusage*, leaving, as this would, the indictment to charge *legal loans originally made*, but *subsequent usurious agreements* and takings of usury. This indictment was continued April term, 1814, by Judge Sewall, in order to report the case, but his death prevented a report. November term, 1814, an affidavit, by one of the



СН. 211. deft's. counsel, was filed with copies of the notes annexed, stating they were the notes produced in evidence at the trial.  
*Art. 11.* This brought the questions of variance fairly before the court.

This cause was argued first as to the variance; deft. urged, that there was a material variance between the contracts stated in the indictment and those so proved, and cited many authorities on this point of variance, stated in former chapters, such as *Carlisle q. t. v. Trears*, Cowp. 671; *Wade q. t. v. Wilson*, 5 East, 192; *Rex v. Pepperell*, 1 D. & E. 240, and 447, *Church v. Wilkins*; *Bridge v. Austin*, 4 Mass. R. 115; *Tate v. Willings*, 3 D. & E. 535; *Helman v. Bennett*, 5 Esp. R. 227; *Gwinne v. Phillips*, 3 D. & E. 64; *Shute v. Worsley*, cited Dougl. 668; *Whitwell v. Bennett*, 3 Bos. & P. 559; *White v. Wilson*, 2 Bos. & P. 116; *Cook v. Graham*; *Pitt v. Green*; *Symonds v. Ball*; *Lucy v. Goodson*; *Spaulding v. Mure*, &c. &c.

§ 2. As to the forbearance to Hayden alone, *Wade q. t. v. Wilson*.

§ 3. No corrupt agreement is stated in the indictment; only that 12 per cent a year was taken, *by means of a corrupt bargain* between the deft. and Hayden. 1 Haw. P. C. ch. 82, s. 24, 25, a usurious agreement is material to constitute the offence of usury; and how made. *Rex v. Walker*, Sid. 421, pl. 9, a corrupt agreement must be laid; forty shillings was taken after lending, and no corrupt agreement was laid before or at the time of lending; held, there could be no judgment on the statute, but only at common law. 5 Bac. Abr. 423.

§ 4. The words as to the notes cannot be stricken out of the indictment as surplusage. The rule in this respect is found in *Bristow v. Wright*, Dougl. 665; *Rex v. Harris*, 8 Mod. 127; *Crawford v. Whittall*, Dougl. 4; *Rex v. Stephens*, 5 East, 254.

§ 5. If these words be considered as so stricken out, as is suggested, no good indictment will remain; these words are material as they alone contain any contract express or implied, to repay the monies lent. Such contract is essential to constitute usury; in which the essentials are: 1. A loan: 2. Such contract: 3. Actual taking above 6 per cent a year: 4. A corrupt agreement. Strike out these words and there will remain only a loan and such taking. *Jansen's case*, 1 Wils. 286, there "must be a loan to be repaid at all events; same, *Murry v. Harding*, 3 Wils. 390; *Crown C. C. 742*, the same; 3 Ld. Raym. 34, the same; so *Rast. Ent. 689*; 2 Ld. Raym. 1144; 2 Salk. 630; *Cro. El. 393*.

But notwithstanding these objections, the court gave judgment against the deft. for a fine, \$900, the sum lent.

§ 6. For several indictments in this State, Commonwealth *Ch.* 211.  
*v. Frost* ; Same *v. Churchill & al.*, *Ch.* 153, and other chap- *Art.* 12.  
 ters. Indictment lies not at sessions for usury ; nor does an  
 indictment lie barely for a corrupt agreement ; for there must  
 be an actual taking of excessive interest in pursuance of that  
 agreement. *3 Salk. 188.—*  
*2 Stra. 816,*  
*Rex v. Upton.*

§ 7. If the wife lend monies usuriously, without her hus- *Barnet v.*  
 band's knowledge, it is his usury *civiliter*, but not *criminaliter*. *Tompkins.*  
*Skin. 348.*

In the several cases cited in King's case, above, most of  
 the law will be found, in relation to usury, *criminaliter*.

*Ways.* Offence in not repairing, see *Ways*, *Ch.* 79, a. 9,  
 &c. ; see *Highways*, *Ch.* 208, a. 7.

*ART. 12.* In the United States weights and measures how  
 derived, and how uniform, and established by law. These, in  
 all the States in the Union are generally uniform, all being  
 regulated by the English standard ; and to use weights and  
 measures varying from it, is usually an indictable offence at  
 common law and sometimes by statute.

§ 1. *How derived.* In deriving them from England we  
 may begin with the statute of the year 1266, 51st Hen. III.  
 By this act it was enacted, "that an English penny called a  
 sterling round, and without any clipping, shall weigh thirty-two  
 wheat corns in the midst of the ear, and twenty pence do  
 make an ounce, and twelve ounces one pound, and eight  
 pounds do make a gallon of wine, and eight gallons of wine do  
 make a London bushel, which is the eighth part of a quarter."  
 This penny was a piece of money, and thus the kernel or  
 grain of wheat was the first standard of all our weights, and  
 the weight called a grain was made equal to it in weight ;  
 thirty-two of these made the weight of said penny, and of the  
 weight called the pennyweight, twenty of these made the  
 ounce weight, and twelve of these the tower pound. This  
 little weight called a grain has never varied, as it has ever  
 been used in the place of the wheat corn or grain, a standard  
 deemed fixed in nature. This system was simple and valu-  
 able. The penny in circulation was also the penny of ac-  
 count, as our cent is. So the shilling and the pound. It made  
 wheat the standard for the weight of silver money ; thirty-two  
 grains of wheat the exact weight of the circulating penny, and  
 this of the weight of those thirty-two grains. It made a pint of  
 wine weigh a pound ; hence, if sold by measure or weight the  
 result was the same ; so as to corn. This system did not  
 deem the kernel of wheat always of the same weight, it merely  
 used it to make the standard weight of the exchequer. It  
 made the standard bushel hold sixty-four pints or pounds of  
 wine, being eight gallons ; and as the cubic inch of wine was

Ся. 211. computed to be a fifth part heavier than the cubic inch of  
 Art. 12. wheat, a bushel to hold sixty-four pounds of wheat was a fifth  
 larger than the wine bushel holding eight wine gallons. The  
 penny sterling unclipped was the first standard weight of the  
 exchequer; twelve of them made a shilling, and 240 of them  
 a tower-pound money weight. The 14 Ed. III. ch. 2, and  
 27 Ed. III. ch. 10, required there should be one weight and  
 one measure throughout the realm of England.

§ 2. *The long measure how derived*,—was from the barley-  
 corn, three of which made an inch, and twelve inches a foot  
 &c; therefore, the barleycorn became the first measure, with  
 its divisions and multiples, of all our measures of length, super-  
 ficies, and of capacity. But like the varying wheat corn it  
 was used only to make a permanent exchequer standard by,  
 as the English foot, just a third of the brass yard rod, kept as a  
 standard in the exchequer. So invariable sameness has de-  
 pended on preserving the exchequer foot or yard measure  
 exactly of the same length; 1 Bl. Com. 274, 275; and not  
 on the barleycorn. So when the Grecian foot measure was  
 once made of the length of Hercules' foot, that perished, and  
 there was no certainty there was any other human foot just  
 the length of his. If found to be so, it was by using this made  
 foot measure.

§ 3. The Winchester bushel, containing 2150.42 cubic  
 inches, the present wine gallon 231 such inches; the beer or  
 ale gallon 282 cubic inches. The present Troy weights and  
 present Avoirdupois weights—these do not appear in the sys-  
 tem of 1266, but crept in and had varied in practice till fixed  
 by statutes and usage.

§ 4. *The Winchester bushel*. The wine bushel we have  
 seen contained sixty-four pounds of wine, and held eight gal-  
 lons of wine, each containing eight pounds weight, and each  
 216 cubic inches, and each inch of wine (Gascoign, now  
 claret) weighed 250 grains Troy. It was a part of the ancient  
 law to make a vessel often bearing the same to contain the  
 same weight of different things not of the same specific grav-  
 ity. Hence the wheat bushel was made to contain sixty-four  
 pounds of wheat, and to do that it was a fifth larger than the  
 wine bushel for the reason above. The wine gallon of 216  
 cubic inches of 1266, was just the eighth part of an English  
 cubic foot of 1728 cubic inches. It follows, the wine bushel  
 contained a cubic foot of 1728, just four fifths of the wheat  
 bushel, as stated by Mr. Jefferson in his report, 1790; add a  
 fifth 432 to 1728 gives the wheat bushel 2160 cubic inches,  
 larger than the Winchester bushel, which in 1696 was found  
 to contain but 2145.6 cubic inches of spring water. In 1685,  
 a cubic foot which weighed at Oxford 1000 ounces Avoirdu-

Difference  
 not exactly a  
 fifth.

pois, and in 1696 the Winchester bushel 2145.6 cubic inches was found to contain just as much, 1000 ounces of Avoirdupois of wheat, the difference nearly one fifth. By the 13th of W. III. ch. 5, A. D. 1701, the Winchester bushel was deemed the standard for measuring grain, and made such measure any cylindrical vessel of eighteen and a half inches diameter, and eight inches deep inside; these contents made the 2145.42 cubic inches the present Winchester bushel, which has been long established by law or usage in each State; except the bushel in Connecticut holds 2198 cubic inches; in Kentucky 2150 $\frac{1}{2}$ ; in Indiana, Ohio, and Mississippi 2150 $\frac{1}{10}$  cubic inches; same Missouri.

CH. 211.

Art. 12.

§ 4. The present wine gallon contains 231 cubic inches; the old wine gallon of 1496, contained 224 cubic inches, that of 231 was also introduced in 1496, and was confirmed by the 5 Anne, ch. 27, and by it 252 such gallons make a tun of wine; 126 a butt or pipe, 63 a hogshead. This gallon has been long established in every State. See Report of a Committee of Parliament of 1757, 1758. Before the statute of 1496, the hogshead contained sixty-three gallons, and measured eight cubic feet; so held 13,824 cubic inches, and so each gallon 219 $\frac{1}{10}$ , instead of 231. The gallon of 224 cubic inches was established in 1496 by miscalculation, parliament deranged the system of 1266 which made the wine gallon contain 216 cubic inches, the eighth of a cubic foot. The mistake was in supposing the penny sterling of 1266 was the pennyweight Troy, and in a belief it was the measure of eight gallons of wine, and not that that constituted the bushel of 1266 and 1304. But it does not appear the bushel of 1496 was ever in use in England or her colonies, or that they adopted the gallon of 224 cubic inches, the Guildhall wine gallon. By 12 Anne, ch. 17, the coal bushel was made 19 $\frac{1}{2}$  inches diameter, and to hold a quart of water more than the Winchester bushel; this coal bushel some of the States by law have established,—the 19 $\frac{1}{2}$  inches was from outside to outside. The weight of an inch of wine is to that of wheat as 175 to 143.

§ 5. The *beer or ale gallon* of 282 cubic inches seems to have been long since introduced and established by usage in England and all our States, except in some of them it is established by statutes. This beer, ale, and corn gallon ought to have remained one eighth of the Winchester bushel; the 282 is the eighth part of 2256, the result of an old error that continues still as to beer and ale.

§ 6. *The present Avoirdupois weight.* One pound Avoirdupois contains 7000 grains Troy; that is, fourteen ounces, eleven pennyweights, and sixteen grains Troy; a pound

СН. 211. Avoirdupois (112 for 100) contains sixteen ounces, and an ounce sixteen drams; and thirteen ounces  $2\frac{1}{2}$  drams is equal to a pound Troy, which consists of twelve ounces, each ounce of twenty pennyweights, and each pennyweight of twenty-four grains; thirty-two cubic feet of spring water at the temperature of fifty-six degrees of Fahrenheit's thermometer make a tun of 2000 pounds Avoirdupois, or 2240 net weight. It does not appear that our present Troy or Avoirdupois weights were introduced in England by any statute, though they keep to each other certain old proportions. The old easterling pounds of twelve and fifteen ounces were probably derived from the east, the Romans and Greeks. It seems they meant a measure that contained eight pounds of wheat and ten pounds of wine, keeping the proportion in weight of five for wine and four for wheat. The old tower or easterling pound contained eleven ounces and a quarter, three quarters of an ounce Troy less than our pound Troy, the old commercial pound contained fifteen ounces, difference one quarter. The treatise of 1304, called *compositio mensurarum*, says, every pound of money (then a pound in weight as well as of account,) and every pound of medicine consists only of twenty shillings weight, but the pound of all other things consists of twenty-five shillings. Wine and wheat were among the articles of which the pound consisted of fifteen ounces, as wine, all things except medicine and the precious metals. The Avoirdupois weight, 112 for 100, is when the goods weigh twenty-eight pounds or more.

§ 7. *The present Troy pound* divided, as above. The Troy pound is to the Avoirdupois pound, as 5760 to 7000. Every State makes the pound Avoirdupois contain 7000 grains Troy, except Illinois, which makes it contain 7020. In 1527, the Troy pound was substituted for the tower pound, one to the other as 15 to 16. Hence, the penny or 240th part weighed  $22\frac{1}{2}$  grains Troy;  $22\frac{1}{2}$  being to 24 grains as 15 to 16, or as  $11\frac{1}{4}$  to 12, and that was the Troy weight of the thirty-two grains of wheat or kernels. The specific gravity of claret wine is to that of distilled water, as 9935 to 10,000; and its weight as above, is of 250 grains Troy to the cubic inch; therefore if all our standards of weights should be lost they could be restored by using this cubic inch, weighing 250 Troy grains, by making a weight to balance the said inch, which would be a weight of 250 Troy grains, or of eleven pennyweight, six grains Troy. The pound sterling of twelve ounces of 1266 was equivalent to 5400 grains Troy. The pound of fifteen ounces, (commercial) by which wheat and wine were weighed, was equal to 6750 grains Troy; eight such pounds were 54,000 grains Troy, divided by 250, the

number of grains Troy a cubic inch of Claret or Bordeaux wine weighed, gives the gallon of 1266, of 216 cubic inches. This standard wine gallon has been preserved in Ireland, as near as 217.6 is to 216, but long since lost in England. Eighty old easterling tower pounds make 432,000 grains Troy weight, divided by 250, as above, gives 1728 cubic inches, or the cubic foot English, making the gallon 216 cubic inches. We now see the system of 1266 has been departed from, which probably would have remained had the coins of that system remained of the weight they were then of; but in the fourteenth century the old tower sterling pound was (pound weight of silver) coined into 300 pennies instead of 240, as was done in 1266; thus debasing the coin began to destroy the valuable proportions of the system of 1266.

§ 8. The introduction of Avoirdupois and Troy weights further deranged the old system, evidently derived from Egypt, through Greece and Rome, varying the old tower pound from  $11\frac{1}{4}$  ounces to 12, and the old commercial pound from 15 to 16 ounces. These changes originated in private dealings and partly in fraud, grew into usage, and in time usage grew into law. The manner in which they were effected was too intricate to be pursued here. One thing is clear, these new weights in time excluded the old ones, and even before there were any settlements in Virginia, English acts recognised the new ones.

§ 9. *Long Measure.* The foot is the unit, and divided into twelve inches, and these are variously divided, sometimes into three barleycorns, and sometimes twelve lines. The English tun is a weight and a measure; as a weight, is divided into 2000 of 112 pounds, or 2240 pounds Avoirdupois. The English foot differs not the hundredth part of an inch from the Greek; and the English foot was adopted in Russia by Peter the Great. The English standard linear measure in the exchequer is a brass rod one yard or three feet long, by which all her and our long measures have been made. The foot, however, is the proper unit of linear measure.

ART. 13. *Laws in the United States.*

§ 1. By the Constitution of the United States, Congress has power "to fix the standard of weights and measures;" and Congress had the same power under the Confederation: but it is exercised by the State legislatures at present.

§ 2. *Massachusetts statutes.* By acts passed in 1641, 1647, and 1649, the Colony treasurer was directed to provide English standards of weights and measures;—this was done.

In 1692 an act provided "that the brass and copper weights and measures formerly sent out of England, with certificates out of their Majesty's exchequer, to be approved Winchester

CH. 211.

Art. 13.

CH. 211. measure, according to the standard in the exchequer," be the  
 Art. 13. public standard for proving and sealing all weights and measures. The constables were to provide for their towns one bushel, one half-bushel, one peck, one half-peck, one ale quart, one wine pint, and one half-pint; one ell, one yard, one set of brass weights, to 4 pounds, after 16 ounces to the pound, with fit scales and steel-beams, tried and proved &c. by the treasurer or his deputy, to be kept for standards in the several towns by the selectmen, and they and the constables to appoint sealers &c.—were empowered to oblige the inhabitants in April, annually, to bring in their weights and measures to be sealed and proved, and to destroy such as could not be brought to their just standard;—butt, 126 gallons; puncheon, 84; hogshead, 63; tierce, 42; and barrel, 31½.

A. D. 1700, an act required all measures, by which meat, fruit, &c. were sold, to be according to the standard; the bushel 18½ inches inside, intended 8 deep, the Winchester bushel; half-bushel 13½; peck 10½ inches inside.

A. D. 1705, an act provided for beams, scales, and nest of Troy weights, from 128 ounces downward to the least denomination, marked by the English standard; town standard to be proved every ten years. A. D. 1730, an act declared "the brass and copper weights and measures lately sent out of England," "to be approved Winchester measure &c. to be the standard throughout the Province;"—they still remain the legal weights and measures.

A. D. 1739, an act added a wine gallon and wine quart;—provided for county standards;—1743, an act provided for oaths.

§ 3. Feb. 26, 1800, an act revised and repealed the former acts, and confirmed old weights and measures; directed the bushel to be 32 Winchester quarts as before understood; added one 56 pound weight, one 28, one 14, and one 7, made of iron;—directed county standards to be kept by county treasurers, to be proved &c. every ten years;—same by town treasurers. By this, and an act of June 16, 1800, the bushel is not required in counties or towns; and towns procure troy weights only of 18 ounces and less. Maine act, ch. 131.

Feb. 26, 1801, an act directs weights &c. to be of brass, copper, pewter, or iron, or of wood.

March 9, 1804, an act directs troy weights to be corrected, and weights of banks to be annually proved.

§ 4. Other States in the Union,—they have done as Massachusetts has, with trifling exceptions. There are in every one many statutes regulating the size of casks for many purposes, which do not affect the standards of weights and measures, as the bushel, gallon, pound, &c., and their divi-

sions and multiples. The Connecticut bushel has been noticed, and she once had said gallon of 224 cubic inches ;—made weights of 1, 2, 4, 7, 14, 28, and 56 pounds the standard, of avoirdupois weight. Her quart measure contained 68.67 cubic inches ; 264.68 in a gallon. She has the yard standard divided into 3 feet,—each into 12 inches. Many States have not by law adopted the troy weight.

In New York the bushel of wheat weighs 60 pounds net,—has adopted the brass yard measure of the exchequer. Other States have done so by law or in practice. Pennsylvania by statute applies the ale measure to cider ;—so other States in practice. The bushel of Kentucky as above,—so of Ohio, Indiana, and Mississippi ; Missouri the same, 2150 $\frac{1}{2}$ .

Louisiana, since 1814, has used our English weights and measures, if not sooner ; before a part of the Union used those of France. Act in Kentucky, Dec. 20, 1799, repeals the Virginia act of 1734. Thus, with the above small variations, all parts of our country do, and ever have recognised as their standard weights and measures, those of the English exchequer ; so one uniform system in a larger territory than probably is elsewhere to be found. But weights and measures not being accurately made in many places, according to the legal standards, there are in practice considerable variations. The French foot is to the American as 16 to 15 ; the fathom (toise) 6 F. feet ; perch 18 F. feet, as used in Louisiana. Mass. act of Feb. 19, 1818, directs the weight of salt and grain, regulates the manner of weighing &c. ;—salt, 70 pounds a bushel ; Indian corn or rye, 56 ; barley or buck-wheat, 46 ; oats, 30 ; wheat, 60.

#### ART. 14. *Adjudged cases.*

§ 1. Indictments for false weights and measures. See Fraud, Cheating, &c. Held, that an indictment for selling light bread, must state what is due weight, as well as that the bread wanted due weight, and how much ;—and it is an offence indictable at common law to sell less than the legal measure.

CH. 211.

Art. 14.



2 Salk. 687,  
Rex v. Flint.  
—3 Salk. 329.

§ 2. Bushel, without any other circumstance, means a bushel by statute measure. The declaration was to sell so many bushels ;—evidence, the deft. agreed to sell so many bushels of corn according to a particular measure, will not support the declaration. The particular measure was a bushel that held 8 $\frac{1}{2}$  gallons ;—was a variation in substance. Virginia act of 1734. By said Kentucky act, the bushel contains 2150 $\frac{1}{2}$  solid inches.

4 D. & E. 314,  
316, Hockin  
v. Cooke.

§ 3. Held, it is illegal to sell corn by any other bushel than the Winchester, and the offender may be indicted on 22 Ch. II. c. 8. ;—this corn was bought by the customary bushel used

4 D. & E. 750,  
Rex v. Ma-  
jor.



CH. 211. in the Isle of Wight, which contains a pint more than the  
*Art. 14.* Winchester measure. This act forbids the sale of corn by  
 any other measure than the Winchester.

D. & E.  
 838, 344, St.  
 Cross Hos-  
 pital v. Lord  
 Howard.

§ 4. Held, that if a hospital lease be renewed, and in the renewal it be expressed so many quarters of corn, it shall be understood to be legal quarters, 8 gallons to a bushel, though the old leases and practice of the parties had been to allow 9 gallons to a bushel.

3 Burr. 1841,  
 Rex v.  
 Crooks.

§ 5. The deft. was indicted for selling by false weight ;—motion to quash the indictment by Mr. Wallace. The charge was, that the flour-scale was the lightest, whence he inferred, the deft. injured *himself*, not his *customers*, who bought flour of him : 2. That the charge was only of selling by the false scales generally, not saying *where*, so that it did not appear that the offence was committed within the jurisdiction of the sessions. The court held, it was not bound to quash the indictment on motion, and as it was an indictment for such an offence, the deft. might demur to it.

3 Burr. 1841.  
 Rex v. Os-  
 born.

§ 6. The deft. was indicted for selling coals by false measures ;—was a like motion by the deft. and like refusal.

Indictment  
 for selling by  
 false weights  
 and mea-  
 sures, 6  
 Wentw. 389,  
 391, four  
 counts.

§ 7. A summary view of standard weights and measures, exactly made and preserved :—we need but few. First, the *long or linear measure*, as the foot or yard, as a unit ; from this all measures of length, superficies, and of capacity may be formed, so we want but one long measure as a standard.

Second. *Measures of capacity*, as the bushel and gallon, we want but three : 1. The wheat or grain bushel : 2. The wine gallon : 3. The beer gallon. From these standards, well preserved, their divisions and multiples, all other measures of capacity may be formed. And abolish the distinction between dry and liquid measures, between wine and beer measures, and we should want only one, a gallon measure as a standard.

Third. *Weights, as the Troy and Avoirdupois* ;—we want but two, one of each, as the Troy pound weight, and the Avoirdupois pound weight ; from these and their divisions and multiples, all other weights may be made ; and abolish the Troy weight, but little used, and we should want but one standard weight.

Fourth. In fact, if we could make and preserve one perfect measure, as the foot, or one perfect weight, as the pound, we should be safe ; for knowing the weight of a cubic foot of water, or a cubic inch of it, if all weights were lost, we could by our foot-measure form a vessel to hold exactly a cubic foot of water, or other liquid of known weight. The foot of water weighing 1000 ounces, one or more weights could be made by trial, to balance the water, and weigh 1000 ounces,

So if all our linear measures should be lost, we could restore them by means of weights, and the 1000 ounces of water which would fill a cubical vessel, the diameter of which would be a foot.

CH. 212.  
Art. 1.

## CHAPTER CCXII.

### CRIMES AFFECTING INDIVIDUALS.

#### ART. 1. *General principles.*

§ 1. Having in the thirteen next preceding chapters considered crimes and punishments generally,—also crimes more immediately affecting the *public*, as crimes against religion and morality, under the several proper heads;—also against the State in the same way;—also felony in general;—likewise crimes against public polity, as against public justice, the public peace, the public trade, the public health, and the public police, and economy, under their various particular heads;—it now remains to consider crimes as more immediately affecting individuals.


§ 2. These are of two general descriptions; those committed upon their persons, and those committed upon their property. Those committed upon their persons, are usually of three more general descriptions, as those against life or homicide; those upon their limbs or mayhem; and those smaller crimes committed upon their persons by assaults, batteries, &c.

§ 3. Crimes committed upon property may generally be viewed as those against the dwelling-houses of men—their castles,—and those against other property, as lands, goods, and chattels. General principles and maxims in regard to all these crimes against individuals, have already been considered in chapter 197, in which the nature of crimes and punishments were treated of.

§ 4. Crimes committed upon persons, are duelling, mayhems, murder, and manslaughter, rape, robbery, sodomy, and suicide; also smaller offences already considered as breaches of the public peace &c.

§ 5. Crimes against property remaining to be considered, are arson, breaking open houses, burglary, burning houses, &c. forgery, larceny, store-breaking, and as to stolen goods.

**CH. 212.** These crimes affecting individuals, like those affecting the public, may well enough be considered in alphabetical order, occasionally taking a combined view of some of them, as those included under the general name of homicide &c.

**Art. 2.**  


**ART. 2. Homicide.**

Hale's P. C.  
424, 425, &c.  
—East's C.  
L. 214.

§ 1. The statutes of Congress and of Massachusetts take notice only of murder and manslaughter, killing in duels, and by suicide, leaving in general other homicides as they are at common law;—also what is murder or manslaughter is not defined by any statute; but what is either, is ascertained by the rules of the common law. Homicide is felonious, excusable, or justifiable; felonious, as murder and manslaughter; excusable, as by misadventure, and in self-defence; justifiable, as where an officer legally executes a criminal, as where an officer kills a person who assaults him, or resists him in the execution of his office, as where an officer or private person attempts to take a felon, and is resisted, and in the endeavour to take the felon he is killed;—as in the case of a riot as above stated;—as where one attempts a murder or other high crime, and is killed, to prevent his execution of it. Some do not include murder in homicide; but Blackstone says, every homicide is deemed murder, unless the contrary be proved. And it is generally agreed, that homicide includes felonious killing.

East's C. L.  
214 &c.—3  
Inst. 47.—4  
Bl. Com. 195.

Hale's P. C.  
425, 426.—  
East's C. L.  
215, 219.

§ 2. As murder, manslaughter, and other species of killing reasonable creatures, under the public peace, are differently punished, it is material to ascertain which is the one, and what is another kind of homicide. In treating of malice and felony in former chapters, several cases were stated, tending to shew the true distinctions in these respects;—a few more will be added here under this head of homicide. In general, says Coke, murder is “when a person of sound memory and discretion, unlawfully killeth a reasonable creature, in being and under the king's peace, with malice aforethought, either expressed or implied.” Hale says, “murder is the killing of a man of malice aforethought; homicide is killing a man without forethought malice.” To constitute murder it is essential, 1. The party killed die within a year and a day after the stroke or wound given, occasioning his death. And if A give B a mortal wound, A is not a felon till B dies; and if this wound be given on the high-seas, and B dies in England, neither the admiralty nor common law can try A, (as the law anciently was.)

1 Hale's P.  
C. 428, 429.

§ 3. If A give B a stroke, not in itself mortal, and which with good care may be cured, yet if B die of this wound, within the year and day, it is homicide, or murder, as the case is; but if it be not mortal, and B's death is caused by

the ill application of medicines, it is otherwise, and not homicide, if it clearly appears the medicine, and not the wound, cause the death. But if B's wound be not mortal, yet if the wound produce a gangrene or fever, and such fever &c. be the immediate cause of his death, and the wound only the mediate cause, this is a murder or manslaughter in A; for the wound producing the fever or gangrene &c. and that producing the death, the wound consequently is the cause of the death. If B be in such a decline as probably to die in six months, and A give him a stroke, whereby his death is hastened, it is murder or homicide, as the case happens; for the party "doth not die simply *ex visitatione Dei*, but the hurt that he receives," hastens his death; "and an offender of such a nature, shall not apportion his own wrong." But it is not murder if A so irritate B's passions, that he dies immediately or afterwards with some disease thereby contracted, for this is no external act of violence; though "this may be murder or manslaughter in the sight of God, yet in *foro humano*, it cannot come under the judgment of felony, because no external act of violence was offered whereof the common law can take notice;" hence before 1 Jam. c. 12, witchcraft or fascination was not felony, because it wanted a trial.

§ 4. If a physician, licensed or not, give medicine with intent to cure or to prevent a disease, and contrary to his expectation it kills, this is no homicide. Same as to a surgeon.

1 Hale's P. C. 429.—4 Bl. Com. 97.

§ 5. If B be with child, and A give her a potion to kill it, and it kills her, this is murder; for it was not given to cure a disease, but unlawfully to destroy the child within her.

1 Hale's P. C. 430.

§ 6. And if A do an act, the probable consequence of which may be, and eventually is, death, such killing may be murder, though he strike no stroke. As where a son exposed a sick father against his will to the air, so that he died; and as where a harlot exposed her child in an orchard, and a kite killed it; held murder, in each case.

4 Bl. Com. 127.

§ 7. If a man have a beast, as a bull, cow, horse, or dog, in his knowledge used to hurt people, or *feræ naturæ*, as a lion, a bear, a wolf, an ape, or monkey, which he knows by nature are disposed to hurt persons, and they do damage to one, the owner is liable to an action, though he use his due diligence to keep them; for he at his peril must secure them; but in point of felony, if he use due diligence, and the ox &c. get loose and kill one, this is no felony in the owner; but if he use not due diligence, it is manslaughter; and if he turn him loose, though only to frighten people and make sport, it is murder.

1 Hale's P. C. 430, 431.—4 Bl. Com. 197.—1 Hale's P. C. 431, 432.

§ 8. If A lays poison for rats, and B takes it and dies, this is no felony. But if A lays poison for B, and C casually

1 Hale's P. C. 431.

CH. 212. takes it, and dies, this is murder in A. And if A gives purging comfits to B, to make sport, and not to hurt him, and B dies thereof, this is manslaughter, and not murder.

1 Hale's P. C.  
433.—4 Bl.  
Com. 196.

§ 9. The party killed must be *in being*, to constitute murder or manslaughter. Therefore if A be with child, and she and another cause its death within her, this is neither murder nor manslaughter; but otherwise if after born alive the child dies of the injury received in its mother's womb. And if a sheriff be ordered to hang a man, and he behead him, it is murder.

1 Hale's P. C.  
433.—4 Bl.  
Com. 196.

§ 10. If A kill an alien enemy within the kingdom, it is felony, unless done in the heat of war and in the actual exercise thereof.

§ 11. The party killing must be sound of memory and discretion, so capable of killing. For this point, see Punishment, Minors, Idiots, &c.

4 Bl. Com.  
200, 201.

§ 12. No affront, by words or gestures only, is sufficient to excuse any violence that may endanger the life of another. But if A be affronted by B, and A in beating him with an intent only to chastise him for the affront, and death unfortunately ensues, it will be only manslaughter; this must mean where the affront is an excuse for the chastising on the principles on which human conduct is to be judged of. And *quare*, if it be with a deadly weapon.

4 Bl. Com.  
184.

§ 13. *Manslaughter, Chance-medley or Self-defence.* The true criterion between them is this: "When both parties are actually combating at the time when the mortal stroke is given, the slayer is then guilty of manslaughter; but if the slayer has not begun to fight, or (having begun) endeavours to decline any further struggle, and afterwards, being closely pressed by his antagonist, kills him, to avoid his own destruction, this is homicide excusable by self-defence." Boxing and sword-playing are unlawful acts, therefore if one party be

4 Bl. Com.  
188.—12 Co.  
87.

killed, such killing is felony of manslaughter. And generally if death ensues in consequence of any idle, dangerous, or unlawful sport, as shooting, or casting stones in a town, the slayer is guilty of manslaughter. And if two quarrel, and a third person give a mortal blow, it is manslaughter. And if A whip B's horse, and he thereby runs over and kills a child, it is manslaughter in A, and misadventure in B; for the act was a trespass in A. And if B of his own accord put his horse into speed in the street, and he run over and kill a child, it is manslaughter in B; for this is an unlawful act in B. And if one do an unlawful act, and death is thereby occasioned, it is manslaughter at least; and murder, if death were a probable consequence of it, or reasonably to be expected.

2 Hale's P. C.  
303.

§ 14. *Homicide by misadventure, per infortunium.* This is a species of excusable homicide, "and is where a man is doing a lawful act, without any intent to hurt, unfortunately kills another. As where a man is at work with a hatchet, and the head of it flies off and kills a stander by. Or where a person qualified to keep a gun, is shooting at a mark, and undesignedly kills a man; for the act is lawful, and the effect merely accidental." "So where a parent is *moderately* correcting a child, a master his servant or scholar, or an officer punishing a criminal, and happens to occasion death, it is only misadventure, for the act of correction was lawful; but if he exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manslaughter at least, and in some cases murder;" for the act of immoderate correction is unlawful, and then if with such an instrument, or in such a manner, as that death may probably ensue, it is murder.

CH. 212.

Art. 2.

4 Bl. Com.  
182.—1 Haw.  
P. C. 73, 74.  
—East's C.L.  
220, 221.

§ 15. *Homicide in self-defence.* This is a species of excusable homicide, rather than justifiable. By self-defence a man may protect himself from an assault, and the like, in the course of a sudden quarrel, by killing him who assaults him, and this is what the law calls *chance-medley*; or in a casual affray, or as some call it, *chaud-medley*, or an affray in the heat of blood or passion. This preventive defence can be excused only on sudden and violent cases, "when certain and immediate suffering would be the consequence of waiting for the assistance of the law." "Wherefore to excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible means of escape from his assailant."

4 Bl. Com.  
183, 184.—  
East's C. L.  
221.

§ 16. It is lawful to put away force by force, for every man to defend himself and his goods against unlawful power.

Doct. & Stud.  
7.

§ 17. If one be attacked himself, or sees a wife, a husband, a parent, a child, a master, or a servant, attacked in person or property, such one may oppose force by force. The law thus regards the passions and feelings of mankind, and considers the danger and inexpediency of delay for ordinary process. Self-defence is the primary law of nature; nor can it be taken away by the law of society. But this resistance must not exceed the bounds of mere defence.

3 Bl. Com.  
3, 4.

§ 18. *Justifiable homicide.* This is of several kinds. As where an officer, by order of law, puts a criminal to death; or where he, in the execution of his office, in a criminal or civil case, kills a person that assaults him; or where an officer or private person attempts to take a man charged with felony, and is resisted, and in the endeavour to take him kills him. So in the case of a riot, by Massachusetts statute. So where prisoners in gaol, or going to gaol, assault the gaoler or

4 Bl. Com.  
179, 180.—1  
Hale's P. C.  
496.—East's  
C.L. 219, 220.

CF. 212. officer, and he in self-defence, and to prevent an escape, kills  
 Art. 2. him. But all the books agree there must be an apparent necessity for thus taking away life; and that the arrest could not be made or the escape prevented without.

Mass Col. By these laws it was enacted, "that if any person in the  
 Laws, A. D. just and necessary defence of his life, or the life of any other,  
 1647. shall kill any person attempting to rob or murder in the field or highway, or to break into any dwelling-house, and he conceives he cannot, with safety of his own person, otherwise take the felon or assailant, or bring him to trial, he shall be held harmless."

4 Bl. Com. § 19. *Homicide is justifiable* to prevent any atrocious  
 181, 182. crime. As where one attempts to commit murder, robbery, burglary, rape, arson, &c. and shall be killed in such attempt, the slayer shall be acquitted. But this extends not to a crime unattended with force, as picking of pockets &c., or to breaking a house in the day time, unless there be an attempt to rob also. So a husband or father may justify killing one who attempts a rape on his wife or daughter. And generally if one attempt forcibly to commit a capital crime, it is lawful to repel that force by the death of the party. "But the law will not suffer with impunity any crime to be prevented by death, unless the same crime, when committed, would be punished with death." And justifiable homicide rather deserves praise than punishment.

*Notes on the article 2d, as to homicide*, thus far in its various branches necessarily considered at large. Two material points deserve attention: 1. "The law will not suffer with impunity," &c. as above. This may be a good general rule, but has its exceptions; for the punishment may be often varied by statute, and yet right to prevent a crime by taking life not varied. For instance, till 1805, burglary was punished with death generally, in this State; since, the punishment of this crime has been changed into solitary imprisonment, and hard labour in the State prison, of course no longer punished with death, except as *postea*; now surely this does not vary the right one before 1805 had to prevent burglary in his house, by the death of the person persisting in committing burglary; but since 1805 this right has been the same as it was before, and so invariably understood. So when a *rape* was punished only with fine and imprisonment, or fine alone, the woman's right to prevent it by taking the life of him who persisted in the crime, was the same it has been since that crime has been capitally punished. If this principle, laid down by Blackstone, be without exception, we have but five crimes in this State that can be prevented by taking the life of him persisting in the crime, to wit, treason, burglary armed, arson in the night,

murder, and rape ; and in the Colony of Massachusetts there were seventeen crimes, in which life might be so taken, because in that there were seventeen capital offences. And it is doubted if the degree of punishment annexed to a crime is the principal measure or limitation of this right, but the pertinacity with which the offender persists in committing the crime. For instance, an officer is legally conducting one to prison, regularly charged with a crime not capital, this prisoner persists in making his escape, so that to prevent it the officer finds it absolutely necessary to kill him, according to all our books this is justifiable homicide. So one pertinaciously persists in burning my house, in the day time, not now a capital offence, and in a way to expose to conflagration a whole town, and to prevent his committing the crime it becomes necessary to kill him : now is this lawful, or must he be allowed to commit it rather than one kill him ? The reason of the case, and the authorities, justify the prevention of the crime by his death, if that only can prevent it.

CH. 212.

Art. 2.

§ 20. Second. When is a man doing an act guilty of murder, if death unintentionally be the effect of it ? It is clear, this act must be unlawful. But is it every unlawful act accidentally producing death that is murder ? Clearly not, and to this point are many cases above cited. On the other hand, some unlawful acts done and death the accidental effect is murder. What is the principle of distinction ? It is this :— It is murder whenever death is the probable consequence, or the intent is to commit a felony, for when death is the probable consequence or effect of the unlawful act, the law correctly presumes the actor sees this consequence or effect, as if he fire a ball among a crowd of people, or turns a mad bull loose among them. And when the law correctly presumes he sees it, the law also correctly presumes he intends it ; for if a man intend not a mischief he sees must probably follow his act, he will not do it. If one intends not to hurt any of a crowd, he will not fire the ball among them. Again, if a man means to commit one felony by his act, and another is the effect or result of it, it is no excuse he did not mean the particular felony or death happening, but another felony. There are many authorities to this point, as if A mean to poison B, and accidentally poisons C, or meaning to kill the child in its mother's womb, kills her. Then, on the whole, and upon a view of all the authorities to this point, a man commits murder when he does an unlawful act in a case so circumstanced that he may expect death to ensue and be the effect of it, and death does so ensue ;—also, when he means by his act to commit a felony, and the death of a reasonable creature &c. is produced by that act, though he has no inten-



CH. 212. tion to produce this particular death. Foster's C. L. 258 to  
 Art. 3. 322; Kelyng, 118; 3 Inst. 56; 1 Hale's P. C. 475, &c.

§ 21. Having thus far considered *homicide* generally, and at large, it will remain in future chapters to consider each species of it by itself, and in detail, so far as may be necessary to bring into view the principal laws and cases on the subject. See many cases noticed by M'Nally, 380 to 395, generally the cases cited in this and chapter as to murder &c.

ART. 3. *Dwelling-houses.*

§ 1. In the same manner crimes committed in or upon dwelling-houses may properly be considered, first, generally, then each species of crime more in detail relating to them; generally, in regard to the question what is a dwelling-house; for the question applies in the same manner in burglary, arson, and other burnings. As in all these crimes the law distinguishes dwelling-houses from other buildings, not parts of them, and considers the breaking or burning a dwelling-house as a more heinous crime than the breaking or burning other buildings separate and distinct from such houses.

§ 2. *What is a dwelling-house*, which is a man's castle, which the law will never suffer to be violated with impunity. There is no question but every building is a dwelling-house in which a family or even an individual lives and sleeps usually. The question can only arise in regard to houses sometimes not inhabited, and in regard to buildings adjoining or near to the house, as to which many decisions are found, and many nice distinctions are made.

§ 3. Hale says, a church is a dwelling or mansion-house in which burglary may be committed. And if A having a dwelling-house, and upon occasion he and all his family are absent a night or more, this is still his dwelling-house, in which during such absence burglary may be committed. The same is the law if he have two mansion-houses, and is sometimes with his family at one, and sometimes at the other, the one from which he is so absent remains his dwelling-house, but there must be *animus revertendi* as to it, and this *animus* &c. must be proved, and not left doubtful. Nutbrown's case, East, 494. And if a scholar have a chamber in a college, or inn of court, where he usually lodges in term time, and in his absence in the vacation it be broken open, it is burglary, for it remains his dwelling-house, though no one be in it when the fact is committed; and the indictment shall suppose it the scholar's dwelling-house, though all the chambers be under one roof, have but one common entrance. So it is if A hire a chamber in the house of B for a certain time, wherein he lodges, and during the time contracted for it is broken open, this is burglary, and the indictment supposes it A's mansion-house; and

4 Bl. Com.  
 223.—East's  
 C. L. 491,  
 508.

1 Hale's P. C.  
 556.—4 Bl.  
 Com. 225.—  
 East's C. L.  
 491, 492, 496.

Audley's  
 case.  
 M'Nally, 345,  
 The King v.  
 Duroro.—  
 Same v.  
 White.—  
 Same v.  
 Woodward.

it is his dwelling-house, though he has never lodged in it, but is moving his goods there in order to lodge in it. These principles are adopted by Blackstone, and law writers generally. But Keeling C. J. thought in the case of the chamber hired by A in B's house, it ought to be said in the indictment the dwelling house of B, for while there is but one entrance, it is but one dwelling-house, though there be several inmates; but otherwise if a man divides some rooms from the rest of his house and makes another door to those rooms. *Keb. 83, &c.*

CH. 212.  
Art. 3.

§ 4. "And if a barn, stable, or warehouse, be parcel of a mansion-house or messuage, though not under the same roof or contiguous, a burglary may be committed therein; for the capital house protects all its branches and appurtenants within the curtilage or homestall."

4 Bl. Com.  
225.—1 Hale,  
558.

§ 5. The mansion-house not only includes the dwelling-house, but also the out-houses, parcel thereof, as barn, stable, cow-house, dairy-house, if parcel of the messuage, though not under the same roof or joining contiguous to it. The back-house of Robert Castle, eight or nine yards distant from the dwelling-house, only a pale reaching between them, was broken open,—and deemed burglary, as it was to all the purposes of this crime part of the dwelling. So a shop, parcel of a dwelling-house, is within the same rule; but otherwise, if he had leased it to B for a year &c., for then it is severed by the lease; but if B or his servants usually or often lodge in this shop, then it is the dwelling-house of B; but if B work or trade in it, but never lies in it, it is no dwelling-house, for being divided by the lease from the rest of the dwelling-house, it is not the dwelling house of him who occupies the other part, nor if he lodge in it occasionally for a special purpose, as to watch thieves, goods, &c.

1 Hale P. C.  
558.—East's  
C. L. 492,  
Castle's case.  
—4 Cruise,  
40.—Leach's  
Cases, 130,  
205.—Haw.  
P. C. c. 38.—  
1 Hale P. C.  
257.—East's  
C. L. 497,  
507.—4 Bl.  
Com. 225,  
226.

§ 6. "But if a barn, or stable, or cow-house be no parcel of the messuage, as if a man takes a lease of a dwelling-house from A, and of a barn from B; or if it be far remote from the dwelling-house, or not so near to it as to be reasonable esteemed parcel thereof; as if it stand a bow-shot off from the house, and not within or near the curtilage of the chief house," then it is not the mansion-house or any part of it.

East's C. L.  
497, 498.

§ 7. See *Commonwealth v. Drew & al.*, Ch. 65, a. 3, and post. When a house is built, purchased, or rented, and is under repairs, or is making ready for the reception of the owner's family, no burglary can be committed in it until the owner or some part of his family goes to inhabit it. *Lyon's case*, Leach, 169. But where a shop was rented with some of the apartments of a house, it was held, that the shop was still part of the dwelling-house, and that burglary might be committed in it, as the house of the landlord. *Leach*, 287.

4 Bl. Com.  
Chris. Notes,  
22.—Lyon's  
case, Leach's  
Cases, 169;  
and East's C.  
L. 497, 498,  
Gibson's  
c. 38.

Ch. 212.  
Art. 4.

Kelyng, 52,  
67, 84, 86,  
Gardner's  
case.—3 Inst.  
64.—Fos. C.  
L. 77.

2 W. Bl. 682,  
Rex v. Don-  
nevan; other  
cases, Ch.  
212, a. 10,  
s. 4.

1 Hale's P. C.  
566, 570.—  
4 Bl. Com.  
221, 222.

1 Hale, P. C.  
568, 269,  
570.—East's  
C. L. 1012,  
1036.

4 Bl. Com.  
221, 222.—  
1 Hal. P. C.  
566, 574.  
Forms of in-  
dictments,  
Cro. C. C.  
238; 4  
Went. 20, 22,  
58, 59.

§ 8. A store twenty feet distant from a dwelling-house, but not connected with it by any fence or enclosure, deemed not a dwelling-house, or any part of a dwelling-house, so not the subject of burglary. But see East's C. L. 492, 493, a pale between. 4 Johns. R. 424, *The People v. Parker*.

§ 9. One Gardner had a house in London, where he usually lived in the winter, and another house in the country, where he usually lived in the summer; and while he and his family were in the country, his house in the city was broken open in the night and his goods stolen, no person being in the house. Held burglary, "for it was his mansion-house."

§ 10. The deft. set fire to the gaol in Liverpool, belonging to the corporation; Rigby, the keeper, had his dwelling-house adjoined to the gaol, and his mother lived with him and kept a public-house; the entrance to the gaol was through this house. Held, this gaol was a dwelling-house; the dwelling-house was a part of the prison, "and the whole prison being the house of the corporation" of Liverpool. But a booth or tent is not a dwelling-house. 1 Bac. Abr. 335.

ART. 4. *Arson.*

§ 1. The malicious and wilful burning the house of another by night or by day, was felony at common law. And if A own a house and lease it to B, and then burn it, this is arson, for preceding the lease this is the house of B. What is a house, see art. 3.

§ 2. So if the fire burn a part and go out, or is put out, it is arson. There must be a wilful and malicious intention to burn a house, therefore if A shoot a gun unlawfully, and it accidentally set fire to B's house, this is not arson; for A had no intention to burn a house.

§ 3. The civil law punished arson with death in certain cases. By the common law it was felony to burn a single barn in the field, if filled with hay or corn, though not part of a dwelling house; and anciently, burning a stack of corn was deemed arson. This offence of arson may be committed by wilfully setting fire to one's own house, if his neighbour's house is thereby also burnt. But if no mischief be done but to one's own, it is not felony, though the fire was kindled with intent to burn another's house. "For by the common law no intention to commit a felony amounts to the same crime, though it does in some cases by particular statutes." However, such wilful firing one's own house in a town is a high misdemeanor, and punishable by fine, imprisonment, pillory, and perpetual sureties for the good behaviour. There must be some burning to make arson; but the burning and consuming of any part is sufficient,—must be malicious. Arson has been variously punished in England.

ART. 5. § 1. By this act it is enacted, "that if any person shall wilfully and maliciously set fire to the dwelling-house of another, or any out-building adjoining to such dwelling-house, or to any other building, and by the kindling of such fire, or by the burning of such other building such dwelling-house shall be burnt in the night-time," punishment of the principal and accessory before the fact, is death.

CH. 212.

Art. 5.

Mass. Act, March 16, 1806.—  
Maine Act, ch. 4.—Kentucky Act, Dec. 19, 1801, s. 11, 12, punishment in the penitentiary.

§ 2. Sect. 2 enacts, "that if any person wilfully and maliciously burn in the day time the dwelling-house of another, or any out-building adjoining to such dwelling-house, or any other building whereby any dwelling-house shall be burnt, or if any person shall, wilfully, and maliciously set fire to any meeting-house, church, court-house, town-house, college, academy, or other building erected for public uses, or to the store, barn, or stable of another within the curtilage of any dwelling-house; and by the kindling of such fire such meeting-house, or other building erected for public uses, or such store, barn, or stable, shall be burnt "in the night-time," the offender and accessory before the fact, on conviction of either of these "felonies" and offences, is punishable by solitary imprisonment not exceeding one year, and by confinement to hard labour for life.

§ 3. Sect. 3, punishes with solitary confinement not above one year, and hard labour not exceeding ten years, this burning any public building, or any store, barn, or stable of another, within the curtilage of any dwelling-house in the day-time, or by night or day any other store, barn, stable, house, or building.

§ 4. Sect. 4 enacts, "that if any shall wilfully and maliciously burn any stack of corn, hay, grain, straw, corn-stalks, flax, fences, piles of wood, boards, or other lumber; or any soil, grass, trees, poles, or underwood of another; and if any person shall wilfully and maliciously kill, maim, or disfigure any one or more of the horses, sheep, or cattle of another," the offender and abettor is punishable by solitary imprisonment not exceeding six months, and by hard labour not above three years; or by fine not above \$500, and imprisonment in the common gaol not above one year.

§ 5. Sect. 5 punishes any person concealing any of said felonies or offences after the fact, with solitary imprisonment not exceeding one month, and hard labour not above five years; or fine not exceeding \$100, and imprisonment in the common gaol not above one year.

§ 6. This act was a revision of the act of March 11, 1785, with some small additions. The expressions in this act were sun-rising and sun-setting. This act of 1785 was a revision of the Province law of 1705; but this severe act of 1705

Ch. 212. punished even burning a shop or ship in the day-time with  
 Art. 6. death, but limited the age of the offender to sixteen years  
 ~~~~~ and upwards. This Provincial act was a revision also,  
 with additions, of the Colony acts of 1652, but the Colony  
 acts were less severe, as to the less heinous parts of these  
 burnings, than the said Province act was. What is a dwelling-  
 house, see a. 3.

ART. 6. *Constructions.*

§ 1. There have been but very few prosecutions on these  
 statutes; so that no constructions of much importance have  
 been given of them. Who is of an age to be guilty of arson,  
 see former chapter.

2 Johns. R.  
 106, The  
 People v.  
 Van Blar-  
 cum.

A. D. 1797.

In one case in New York the construction on a similar law  
 was, that if A be indicted for burning B's dwelling-house; and  
 if it be in fact his, the court will not inquire into the tenure or  
 interest of B.

§ 2. In this year a fire was set to a door of a house in  
 Boston, by an incendiary, but was discovered and extinguish-  
 ed. He was indicted for that he on — and between the  
 sun-setting of that day and the sun-rising of the next suc-  
 ceeding day at Boston, did feloniously set fire to, and burn  
 and consume the dwelling-house of S. G. against the peace  
 and the statute in that case &c.

1 Hale's P.  
 C. 566, 567.  
 —3 Inst. 67.  
 —East's C.  
 L. 1019.

§ 3. Arson, malicious and voluntary, has always been se-  
 verely punished as a most heinous crime, immediately des-  
 tructive of man's habitation, and usually involving, especially  
 in towns, the most ruinous consequences, especially in the  
 night; hence our statute has very reasonably made a differ-  
 ence between arson in the night, and in the day.

§ 4. As we have had in Massachusetts statutes of our own  
 on these subjects of arson and burnings, and those very full,  
 from the first settlement of the country, it is conceived we  
 have never adopted the English statutes on these subjects.

§ 5. But any burning not included in our statutes, but pun-  
 ishable at common law, may well remain so still.

1 Hale's P.  
 C. 568, 569,  
 570.

It was not felony, at common law, to burn the frame of  
 a house or a stack of corn, but made so by statute in Eng-  
 land.

East's C. L.  
 1019.

§ 6. If the incendiary mean to burn B's house, and burn  
 C's, it is arson. As if A have a malicious intention to burn  
 the house of B, and set fire to it, also C's house, and B's  
 house escapes, and C's is burnt, this is arson, though A do  
 not intend to burn C's house, yet in law it is a wilful and  
 malicious burning of the house of C, and A may be indicted  
 for the wilful and malicious burning the house of C. And so  
 is our statute on a fair construction of it. As to allowing  
 clergy to one convicted of arson in the night, on our statute,

or the commutation instead thereof, see Benefit of Clergy and Commutation; and Hale's P. C. 570 to 574. Ch. 212. Art. 6.

§ 7. Holmes was indicted for that he was possessed of a house in London for six years, remainder to J. S. for three years, reversion in a corporation, and he, *vi et armis*, feloniously, voluntarily, and maliciously, burnt it with fire, with intention, that house and divers other houses of &c. then and there situated to said Holmes' house contiguous, to burn; held, by a majority of the judges, that burning his house, of which he had a lease for years, was not felony, but a great misdemeanor, for which he was punished with the pillory &c. though he did it with intention to burn the houses of others, but these were not burnt; for "intent only, without fact, is not felony."

Cro. Car. 376, 378, Holmes' case.—4 Bl. Com. 221, cited East's C. L. 1023.

§ 8. Sarah Taylor was indicted for setting fire to an out-house, commonly called a paper-mill. She had set fire to a large quantity of paper drying in a loft annexed, and belonging to a mill, but no part of the mill itself was burnt; held, not arson.

East's C. L. 1020, Taylor's case.

§ 9. Held in this case, that a house is not the house of one having only a right of dower in it, and that not assigned, and where the house is leased to another;—and so it is if one have only the legal reversion or remainder, it is not his house.

Harris' case, East's C. L. 1023, 1024.

§ 10. Spaulding was indicted for feloniously, wilfully, and maliciously setting fire to, and burning his own house. Second count, setting fire to it only. His house had been previously insured, was not adjoining, but was within two or three yards of other houses on each side; and in consequence of his setting fire to it, some part of the timber and thatch was burned. Principle settled was, that a mortgagor, in possession, burning his own house, is no arson, either at common law, or by 9 Geo. I. c. 22, (which statute makes no alteration in the crime) because at common law arson is the burning of the house of another. Nor is it arson for a lessee to burn the house in his possession, under the lease; for arson is an offence immediately against the possession; and therefore, if a person in possession of a house as tenant, however short his term may be, set fire to it, it is not arson;—and the judges recognized Holmes' case as law, and said the 9 Geo. I. did not vary the offence.

Spaulding's case, 1 Leach, 258.—East's C. L. 1026, 1026.

Breeme's case.

§ 11. These cases were, A. D. 1782, recognised again in Pedley's case, who was charged with burning his own house, (among other charges);—also with setting fire to it, with intent to burn the house of Richard Coombe &c., by which his house was burnt. The special verdict found the house had been leased by the Mayor of Bristol to Coombe for

East's C. L. 1026, 1027, Rex. v. Pedley—1 Leach, 277.

Ch. 212. ninety-nine years ; by him to one Parry for a year, and so from year to year ; and by Parry to one John Landry for three months, who was in possession of it when burnt. There was no count stating it to be Landry's house ;—the court held, that as arson was an offence against the possession of another, judgment must be for the deft. ; but recommitted him, as he had not been tried for burning the house of the tenant.

East's C. L.  
1027, Gow-  
en's case.  
A. D. 1786.

§ 12. It is not a mere residence in a house, without any interest therein, which will bring a party within the principle of the above cases. In this case of Gowen, the house burnt by him was rented by one R. D. named as owner in the first count ; and let by him from year to year, to the parish officers of Laxfield, who paid the rent for it, and who were, when it was burnt, the persons named (individually) in the third count of the indictment, framed at common law, also on 9 Geo. I. The prisoner was a poor man, maintained by the parish, and had for some time before the house was burnt, been put in by the parish officers to live there, and was resident in it with his family at the time of the fact committed, and had the sole possession and occupation of it, without payment of any rent. All the judges adjudged him guilty ; for he had no interest in the house, but was merely a servant, so not *his* house, but the overseers had the *possession* of it by means of his occupation.

East's C. L.  
1028, 1029.  
Scofield's  
case.

§ 13. Scofield was indicted, and there were six counts in the indictment, stating the offence different ways, and in all to be feloniously done : held, arson is an injury only to the actual possession, and must be so laid ;—also where the indictment charges an offence to have been done with a felonious intent, and the jury find a verdict of guilty, if the charge as laid do not amount to a felony, but amount in law to a misdemeanor, the court will give judgment as for that offence. And because in the first count the charge was, that the prisoner burnt *a house of which he was in possession*, and this appeared on the face of the record ; and on this count the judgment was : hence the court saw the offence charged was not a felony ;—then the word, *feloniously*, was repugnant, and to be rejected as *surplusage* ;—then judgment as above, as in Holmes' case.

East's C. L.  
1030, 1031,  
Probert's  
case — A. D.  
1799, Isaac's  
case, the  
same.

§ 14. The same principle was laid down in this case ; he was indicted for a misdemeanor, in having unlawfully, wilfully, and maliciously set on fire and burnt a certain house of one M. B. in the deft's. occupation, and contiguous to the dwelling-houses of divers persons, putting them in danger &c. Second count laid it his own house. He was found guilty.—Held, if done with intent to defraud insurers, and other houses

be burned in consequence, the latter is felony. Therefore, if the primary intent of one be to burn his own house, and he burns those adjoining, if so situated as probably to be burnt, it is felony and arson, though he meant only to burn his own.

CH. 212.

Art. 7.

§ 15. *Indictment.* If the deft. be indicted for a misdemeanor, and the evidence prove a felony, he must be acquitted. The indictment must lay the offence to have been done wilfully and maliciously, as well as feloniously ;—but it may be laid, burning a *house*, without saying a *dwelling-house*. At common law, and on our said statute, it is necessary to state an *actual burning* ;—now common also to state, *setting fire to*. To convict one of a misdemeanor in burning his own house, it must be stated he intended to burn the property of others ;—so it must be stated to be the house of *another*, also *whose house*, and with that the proof must agree ; but it may be laid to be the property of parish overseers, or of persons unknown.

East's C. L.  
1032, 1035.—  
1 Leach, 82.

Richman's  
case, M'Naf-  
ly, 417.

#### ART. 7. *Burglary.*

§ 1. This is another atrocious crime committed against a man's habitation, or dwelling-house, sacredly protected even by the law of nature. This crime is well defined to be where "any person shall, in the night time, burglariously break and enter any dwelling-house, with intent to kill, rob, steal, commit rape, or to do or perpetrate any other felony." And by this act the punishment was death. Is a felony at common law. H. P. C. 80 ; 3 Inst. 63.

Mass. Act,  
Mar. 7, 1785.

§ 2. By Massachusetts Colony law, passed A. D. 1646, burglary was punished by branding the first and second offences. The same nearly by the laws of the Colonies of Connecticut and New Plymouth. Our Province statute of 1715, limited the offence to a dwelling house, inhabited at the time of the offence committed. It is not a little strange these colonies, especially that of Massachusetts, should punish this heinous crime so lightly, and at the time too it enacted seventeen capital offences. The very description of burglary involves in it several questions : 1. What is night time : 2. What is breaking and entering : 3. What is a dwelling-house : 4. What must be the intention. These points may be considered in this order, observing that this new Massachusetts act preserves the same material points in the commission of this crime, though it adds some circumstances, as "any person then being lawfully therein, and such offender being at the time of such breaking and entering armed with a dangerous weapon, or arming himself or herself in such house, with a dangerous weapon, or committing an actual assault upon any

Maine Act,  
ch. 6.—Ken.  
Act of Dec.  
19, 1801, s.  
13, 14, peni-  
tentiary 1 to  
7 years.—2  
Chit. C. L.  
1100.

Mass. Act,  
Mar. 13, 1806.



CH. 212. person lawfully being in such house. Punishment, death. Not armed, a less punishment &c.

Art. 8.

ART. 8. *What is night time.*

4 Bl. Com.  
224.—1 Hale,  
351.—East's  
C. L. 508.—  
Crompton,  
33.—Oal. ch.  
99.—H. P. C.  
79.—3 Inst.  
63.—7 Co. 6.  
—Haw. P. C.  
ch. 38, s. 2.  
—1 Bac. Abr.  
641.—Chip-  
man, 32.

§ 1. "The better opinion seems to be, that if there be daylight, or *crepusculum*, enough begun or left to discern a man's face withal, it is no burglary." But this does not extend to moonlight. And the malignity of the offence arises mainly from its being done at the dead of the night, when sleep has disarmed the owner. In the indictment it has been usual to state the time of night, as in the following indictment on Massachusetts act of 1785. The jurors presented, that A. B. &c. with force and arms, feloniously and burglariously, did break and enter the dwelling-house of C. D. &c. at ———, in said county, in the night time, that is to say, between the hours of ten and eleven of the clock in the evening of the same day, one E, then being in the same house, in the peace of God and of the Commonwealth, and then and there did feloniously steal, take, and carry away, £20, and also of the goods and chattels of the said C. D., then and there found in the said house, against the peace, &c. Anciently, night time was not made a material part of the offence.

Mass. S. J.  
Court, Essex,  
Nov. Term,  
1794, Com-  
monwealth v.  
Chevalier &  
al., Attor.  
Gen. for the  
State, Sewall  
& Dane for  
the defts.

§ 2. In this case of an indictment against Charles Chevalier, and Matthew Plaintain, for burglary, for breaking and entering the dwelling-house of Elizabeth Clarke, in Salem, June 27, 1794, this question of night time was made. The facts were: the watch found the defts. in her shop, part of her house, separated from her sitting-room by a door locked, at 28 minutes after 2 o'clock in the morning; the defts. confessed they had been there about nine or ten minutes, which confession being confirmed by the facts of breaking and other acts to make up that time, was reckoned, which made the entry about 18 minutes after 2. The breaking and stealing were clearly proved. Two questions were made: 1. If the shop was a dwelling-house, within the meaning of the acts of Massachusetts, March 7, 1785, respecting burglary, and of March 15, 1785, respecting larceny, and that clause thereof which speaks of breaking houses in the day time, shops, and mills, &c. in the night or day: 2. Question if the breaking was in the night time. The court was clear the shop was part of the dwelling-house. As to night time, the rule the court laid down was, that there must be so much daylight that a man's face thereby may be discerned. The jury found the defts. not guilty of burglary, but guilty of house-breaking and stealing. The defts. agreeing in their challenges were tried together. The jury held, it could not be night time after the dawn of day, or after the *crepusculum*, or twilight began. By testimony produced, and examining the globe, it appeared

the twilight began that morning about two o'clock, by exact calculation, four minutes, forty-four seconds, after two o'clock. The watch testified it was dark &c. N. B. Twilight continues till the sun gets eighteen degrees below the horizon, perpendicularly; and at that season of the year it passes the horizon thirty-five degrees, twenty-six minutes, before it gets the eighteen degrees below *perpendicularly*. CH. 212. Art. 9.

§ 3. This rule laid down by the court in this case seems to be the true rule, and has been often recognised. By it there must be so much *crepusculum* that by this *crepusculum*, or *twilight*, and this alone, a man's face may be discerned. It being cloudy or moonlight makes no difference. Therefore often the degree of twilight must be a matter of calculation, not of sight, as where it is cloudy, or where the moonlight conceals the smaller degrees of this twilight.

§ 4. If one having no right to the possession of a house, get possession of it fraudulently, by legal process, with intent to rob it, and does rob it, he is guilty of burglary. So if entry be made by any other fraudulent pretence. Kelyng, 42, 44, case of Farr & Chadwick.

ART. 9. *What is a breaking and entering?*

§ 1. It is so if A break a hole one night and enter the next. But there must be an actual breaking, as by opening a window or taking out the glass of it, picking a lock or opening it with a key, or by lifting up the latch of a door, or unloosing any other fastening of the owner; so to come down chimney; so to knock at a door, and on opening it to rush in with a felonious intent, or under pretence of taking lodgings, to rob the house; so if a servant open and enter his master's chamber door with a felonious intent; so if a servant conspire with a robber, and let him into the house by night, it is burglary in both. The least degree of entry, with any part of the body, or with an instrument in the hand is sufficient. As to step over the threshold to put a hand or hook into a window to draw out goods, or a pistol to demand one's money, is a burglarious entry, and though his hand be not within the window. 4 Bl. Com. 226, 227.—East's C. L. 485 to 490.—3 Inst 64.—Dal. ch. 99, 151.—H. P. C. 31.—Haw. P. C. c. 38, s. 4.—Fos. C. L. 107.

§ 2. But if one enter at a door, or window left open, it is no burglarious entry; for it is the owner's negligence to leave them open; but is, if he get entrance by fraud, intending to rob. 1 Hal. P. C. 565. 4 Bl. Com. 226.—Kelyng, 83.

§ 3. The breaking and entry must both be in the night, but need not be both the same night. And it is a burglarious entry if A goes to a house with intent to rob, steal, or commit some felony, and find the outer door open, and enters, and then unfastens an inner door. But it is not a burglarious breaking and entry if a guest, at an inn, open his own chamber door, and takes and carries away his hosts goods, for he 1 Hal. P. C. 566. 1 Hale's P. C. 562, 564.

**CH. 212.** has a right to open his own door, and so not a burglarious breaking.  
**Art. 9.**

4 Bl. Com.  
 Chris. notes,  
 22.—Hughes  
 case, Leach,  
 313.—Haw.  
 P. C. 6 ed.  
 162.

§ 4 In a case where a door has been bored through by an instrument called a *centre-bit*, the end of which must have penetrated beyond the internal surface of the door; held, this was not a sufficient entry to constitute burglary. And when the insertion of an instrument amounts to a burglarious entry, the instrument must be of such a nature as is calculated to effect the intended felony after the breaking is completed.

Mass. S. J.  
 Court, Essex,  
 June Term,  
 1789, Com-  
 monwealth v.  
 Steward.

§ 5. Steward was indicted for burglary in the house of John Fisk. As to his confession, see Evidence. The court laid down the same rule as to night time as in Chevalier's case. And held also, that it is a burglarious breaking to open a door when latched and shut, or to push up a window when shut down, though not fastened; these being in their shut position. But if a window be a little pushed up, or a door a little opened &c., so that one passing by may see the owner has not properly shut his house, it is not a burglarious breaking to enter, though a further pushing up of the window or opening of the door be necessary for the person to enter; but that it is not customary for men, nor necessary always, to have all the glass of their windows whole, or the joints of their doors, windows, &c. exact. Attorney General for the State, Bradbury for the deft.

Mass. S. J.  
 Court, June  
 Term, Essex,  
 1789, Com-  
 monwealth v.  
 Hays.

§ 6. Hays, also, was indicted for burglary in the house of Jeremiah Pearson, in Newbury. Plea, not guilty; and verdict of acquittal. In this case the court stated the law to be, as to breaking and entering, as it was stated above in the case of Steward. Hays got into the house by a window. Attorney General for the State, Dane for the deft.

1 Hale's P.C.  
 553, 554, 555.

§ 7. If A lodge in an inn, and in the night steal goods and goes away; or enters secretly in the day time, and stays till night, and then steals and goes away, this is not a burglarious breaking &c.; but if in either case he had opened an inner chamber door and taken the goods, it had been such. Nor is it a burglarious breaking &c. if A enter the house in the night, the door being open, and breaks open a chest and takes away goods, not breaking any inner door; as the chest is no part of the house; but is, if he break open a study, or counting-house, or shop within the house, though none usually lodge in the study; so if he break open a cupboard or counter, fixed to the house. And if a man take a child, seven or eight years old, and the child is sent into the house by him, and hands goods out to him, and he carries them away, this is a burglarious entry by the man, though he himself never entered the house, and though the child be not guilty on account of his age. Same rule holds if a man so employs his wife. So

1 Bac. Abr.  
 323.

any entry by fraud, as one gains admission pretending business, or to take lodgings, with a felonious intent. CH. 212.  
Art. 10.

§ 8. What is a dwelling-house, see article 3, this Chapter.

**ART. 10. *The intention to commit felony.***

§ 1. The breaking &c., must be with an intention to commit some felony; whether this intention be executed or not is not material; and it may be a felony at common law, or one created by statute. 1 Haw. P. C. c. 38, s. 19. 4 Bl. Com.  
227.—Dyer,  
99, pl. 68—3  
Inst. 65—H.  
P. C. 83, 84.

§ 2. A servant broke and entered his lady's chamber door with an intention to commit a rape. Held, he was guilty of burglary. So where a servant let in a thief. 2 Stra. 881. 1 Stra. 481,  
Rex v. Gray.

§ 3. The defts. were indicted for feloniously and burglariously breaking and entering the dwelling-house of Edward Dixon, in Boston, with intent to cut off an ear of an inhabitant. Held, no felony; so no burglary. See the case, head Felony, Ch. 200;—Attorney General for the State, Richardson for the deft. 7 Mass. R.  
245, 250,  
Common-  
wealth v.  
Newell & 5  
others.

§ 4. This was an indictment for a burglary, laid in the first count in the house of Boulton, second, house of Bush, third, house of Nelson; the place where it was committed was a centre building with two wings; in the centre building the business of Boulton, Bush, Nelson, and several others was carried on; in part of one of the wings was Boulton's dwelling, and in the other part Bush's, neither having any internal communication with the centre except by a window in Bush's part, which looked into a passage that ran the whole length of the centre; and the other wing was occupied by Nelson, from which there was no communication with the centre. Doubtful if this was burglary. Also held, if a servant being solicited to become an accomplice in robbing his master's house, informs him thereof, who tells him to carry on the business, and consents to his opening a door leading to the premises and being with the robbers during the robbery, and also marks his property and lays it in a place where the robbers are expected to come, with a view to apprehend them, the conduct of the master will not amount to a defence for them in an indictment against them. No burglary to enter a house intending a trespass or battery; none in a tent or booth, though the owner lodges therein. East's C. L. 492. 2 Bos. & P.  
508, Rex v.  
Eggington;  
cited East's  
C. L. 494,  
495, & said to  
be adjudged  
no burglary.

**ART. 11. *Massachusetts statutes.***

§ 1. By this act it is enacted, "that if any person with intent to kill, rob, steal, commit a rape, or to do or perpetrate any other felony, shall in the night-time break and enter, or having with such felonious intent entered, shall in the night-time break a dwelling-house, any person then being lawfully therein, and such offender being armed," as above stated, he, Mass. Act,  
March 13,  
1806.—  
Maine Act,  
ch. 6.

CH. 212. his aiders &c. and accessaries before the fact shall suffer  
 Art. 11. death.

§ 2. Section 2 enacts, that such persons so breaking &c., not armed, and without assaulting &c., shall be punished by solitary imprisonment not exceeding two years, and by confinement to hard labour for life.

§ 3. Section 3 punishes accessaries after the fact with solitary imprisonment, not above three months, and by confinement to hard labour not exceeding ten years.

§ 4. Section 4 enacts, "that if any person with intent to kill, rob, steal, commit a rape, or to do or perpetrate any other felony, shall in the night-time enter without breaking, or in the day-time break and enter, any dwelling-house or any out-house thereto adjoining and occupied therewith, or any office, shop, or warehouse, or any ship or vessel lying within the body of the county, he, his aiders &c. shall be punished by solitary imprisonment not exceeding six months, and at hard labour not above three years, or be fined not exceeding \$500, and imprisonment in the common gaol not above three years:"—repeals the former laws. This act is a revision of the acts of March 7, 1785, and part of the act of March 15, 1785, to wit, section 8. The 1st, 2d, and 3d sections of this act of 1806, are formed by enlarging and varying the old definition of burglary, above given, as in that act of March 7, 1785; this act contains only those few lines,—and punishment by death. The reason of this alteration was, many lawyers and judges as well as others, doubted as to the expediency of punishing burglary with death; among other considerations, because it was found difficult by experience to get juries to convict of burglary, especially when the offender was not armed. Others thought, that one armed at least ought to capitally punished. These views of the subject produced these distinctions made in the act of 1806.

§ 5. The acts of March 1785 were revisions of the Provincial statutes on these subjects with some variations. The history of burglary in this State deserves attention. By a law of 1642, burglary was punished with branding, and second offence, also whipping; third offence, death. A law of 1672, punished breaking warehouses, shops, mills, barns, out-houses, ships or vessels on any shore, or in any cove, creek, or upon the water, as breaking up dwelling-houses. As yet the laws of the Colony made no distinction as to day or night-time. The statute of 1692 was a mere revision of the laws, above stated, and punishing as they punished. The statute of 1715, first took the distinction of night-time, and punished with death burglary in the night in a house inhabited; and the reason given for this alteration of the law was, the frequent breaking such houses in the night-time for the purposes of stealing &c.

And the act of 1770 omitted the words, *then inhabited*, and denied the benefit of clergy. The same for entering in the day-time or night and breaking out in the night.

CH. 212.  
Art. 11.

§ 6. No doubt the growing evils of this crime was the principal cause of this gradual increase of the punishment of it.

§ 7. This was an indictment for breaking a store of J. P. with intent to steal, and did steal divers goods &c. against the statute. Held, the indictment cannot be supported under this act, unless it be averred in the indictment that the store is a building. The word, *store*, is not used in this act. Statute 1784, ch. 66.

1 Mass. R.  
517, Commonwealth v.  
M'Monagle.

§ 8. The deft. was indicted for breaking a store in the night-time, and committing a larceny in it, on the statute of March 16, 1805, sect. 6. He was convicted, and motion in arrest of judgment on the ground there was no statute provision for the offence on M'Monagle's case. Attorney-general replied, M'Monagle's case was on the statute of 1784, ch. 66; but this is on the statute of 1804, ch. 142, sect. 6, in which the word, *store*, is enumerated among other buildings. Indictment adjudged good. Storer for the deft.

10 Mass. R.  
153, 154,  
Commonwealth v.  
Lindsey.

M'Nelly, 413  
to 417.

§ 9. The deft., Raymond, was indicted for house-breaking and stealing, and convicted; and when brought into court to receive his sentence the court admitted witnesses as to his character, situation, and general conduct, in order to regulate the degree of punishment.

Mass. S. Jud.  
Court, Essex,  
Nov. 1780,  
Commonwealth v.  
Raymond.

§ 10. *Indictment for burglary, true owner of the mansion &c.* Whenever burglary is committed in a dwelling-house it is material to state whose it is to the purposes of this crime; and to make one a proper owner, so as correctly to call it in the indictment *his dwelling-house*, two things seem to be essential: 1. That he shall have some interest in it: 2. Possession in fact or in law, as already appears in several cases stated. One may be the sole owner, yet for want of possession or inhabitancy in it by himself or by some of his family, it may not be his dwelling-house to the purposes of burglary. So otherwise it may be the dwelling-house of a mere occupier for such purposes, as in the further following cases.

§ 11. One Pearce owned a public-house, and when the last tenant left it, about a month or six weeks before the breaking, he gave up the possession to P. who bought the furniture of him; P. resided and did business in another place, and never meant personally to reside in this public-house, or to have the business of it carried on upon his account, nor did any one inhabit it in the day-time, but P's servant had constantly slept in it for about three weeks, solely to protect the furniture till a tenant could be procured. The deft. was indicted for stealing goods, the property of P. in his dwelling-house. Held, it

Rex v. Davis,  
East's C. L.  
499.

**CH. 212.** was not his dwelling-house within the statute, as he never  
**Art. 11.** meant to inhabit it; and it would have been no burglary if it  
 had been broken in the night.

**Rex v. Jones  
 & al. East's  
 C. L. 499.**

§ 12. But where A died in his house, and B, his executor, put servants into it who lodged in it and were at board wages, but Brewer lodged there himself, Jones & al. were indicted for burglary in it; and held, it might be called the mansion-house of B, because the servants lived there.

**Peyton's  
 case, East's  
 C. L. 501.**

§ 13. Burglary in the apartments of officers of a public company must be laid to be in the mansion-house of the company. As where the African Company owned the house, and one Story was one of its officers, and had separate apartments in it, and lodged and inhabited there. Held, those apartments could not be called his mansion-house, as he and others inhabited the house only as officers of the Company. Though an aggregate corporate body cannot be said to inhabit any where, yet they may have a mansion-house for the habitation of their servants. So John Picket was indicted for burglary &c. in the dwelling-house of the East India Company, inhabited by their servants, and convicted. Like case in the mansion-house of the master, fellows, and scholars of Bennet College in Cambridge; deft. broke into the buttry and there stole some money; and held by all the judges, that it was burglary.

**Picket's  
 case, East's  
 C. L. 501.**

**East's C. L.  
 502, Prosser's  
 case.**

§ 14. If the chamber of a guest, not a regular lodger at an inn, be broken open, it must be laid in the indictment to be the mansion-house of the innkeeper. Prisoner pretended he was robbed by the guest, and with the landlord broke open his chamber to recover the prisoner's goods. This was the prisoner's contrivance to steal the goods of the guest, who was a traveller, lodging there that night only. Held clearly, the landlord's chamber, so the offence to be laid in his dwelling-house; that the guest had no certain interest or possession in the chamber, but that the property and also possession remained in the innkeeper who would be answerable, *civiliter*, for any goods of his guest that were stolen in that room, even for the goods in question, which he could not be unless it was deemed to be in his possession; that he might go in to it when he pleased, and would be no trespasser to the guest. The court observed, he in this case was not a regular lodger. See Lord Hale's opinion, 1 Hale, 554; and 4 Bl. Com. 227; Kel. 69.

**Kel. 43,  
 Farr's case.**

§ 15. The house of a *feme covert*, living apart from her husband, broken open, is in law his house, and her possession is his, as is that of any one of his family, though the husband in the case refuse to have any thing to do with the lease to her, and the landlord thereupon agrees with the wife alone; and it must be called his house in the indictment. But East, 504, observes, that it seems to follow as a matter of course, that

in any case where the court would adjudge the separate property of the mansion to be in the wife, and she has also the exclusive possession, the burglary ought to be laid against her mansion-house, and not his. CH. 211.  
Art. 11.

§ 16. *Several tenements in one house.* Held, that several occupations of distinct parts of the same house, though by partners having a joint-property therein, and paying the rent and taxes for the whole out of their joint-stock, make several mansions. There was no communication between the parts but by the street; the housekeeping was paid by each partner for his own house; the whole house had been formerly one house. The offence being laid in the house of both, the deft. was acquitted of the capital part. Rex v. Jones,  
East's C. L.  
504. A. D.  
1790.

§ 17. Two several houses occupied by two several families are distinct, and so taxable as two, though they have but one common avenue or entrance to both, and if one family move out one is vacant. If one tenement be divided by a partition and inhabited by different families, viz: the owner in one and a stranger in another, these are several tenements, severally ratable while thus severally inhabited; but if the stranger and his family move out it becomes one tenement again. East's C. L.  
504, Tracy v.  
Talbot.

And as to chambers in inns of court, they are to all purposes considered as distinct dwelling-houses; and it makes no difference the owner enters at one common door or not. The sets are often held under distinct titles, and are in their nature and manner of occupation, as unconnected, as if under separate roofs. Evans v.  
Finch, Cro.  
Car. 473.—  
W. Jones,  
394.—1 Hale,  
322.—1 Haw.  
c. 38, s. 11.

§ 18. *Inmates.* As where A hires a distinct apartment for a certain time in B's house, but enters at the same outer door with the other inhabitants, hence an inmate, and this by a lease of the apartment, but the owner inhabits the other parts, or some thereof, all is still his house; and such lodgers are only his inmates, and all their apartments are parcel of the one dwelling-house of the owner. But if the owner do not lodge in the same house, or he and his lodgers enter by different outer doors, the apartments so let are the different mansions for the time being of the several lodgers;—but Hale and Hawkins *contra*; perhaps on the ground that if the owner continue to inhabit a part, the one outer door remains his, and at his command. And A. D. 1782, where an inmate had two apartments or rooms, the one in which he slept, and the other up stairs; held, burglary in the latter must be laid in his mansion, the owner retaining no part of the house, but having let the whole out in separate apartments or lodgings, from week to week at will; held, ten judges against two. The same decision in this was by all the judges on the authority of Carrell's case. Hence it is said to follow, if a man let East's C. L.  
506, 506.—  
Kel. 84 —  
4 Bl. Com.  
226. And see  
Lee v. Gan-  
sel.  
  
Carrell's  
case.  
  
Trapshaw's  
case, A. D.  
1787.



CH. 212. out part of his house to inmates, and continues to inhabit the rest himself, and he breaks open the apartments of such inmates, and steals their goods, it is but felony, and not burglary; as he cannot be guilty of burglary in breaking open his own house.

Rogers' case. But a mere occupation of the owner of some part of his house, without inhabiting the same, makes no difference in the question of burglary, with respect to tenants or inmates. As where the owner let all the apartments to different persons, and a shop, parlour, and cellar underneath to C; the owner took back the cellar to keep wood and lumber in it, deducting a proportion out of the rent;—there was but one common outer door from the street, which communicated with the rest of the house, as well as the shop and parlour in which the burglary was committed;—nine judges, all present, held, the shop and parlour C's dwelling-house; for though the owner occupied the cellar, yet he did not inhabit any part of the house; hence it could not be laid his dwelling-house; *secus*, if he had inhabited a part.

Kel. 83, 84.  
East's C. L.  
507, 508.

§ 19. *A part severed by lease &c.* A has a dwelling-house, and lets a cellar and chamber in it to B, keeping the rest, and no passage to the cellar but from the street: this is broken open in the night, and Kelyng thinks this not burglary;—not in A's house, as he has severed it by the lease, and has no communication with the rest of the house. East thinks otherwise; for the cellar, before a part of the house, is no more severed by the lease from A, than the chamber is let to B; and says, Kelyng admits that if the chamber were broken open, it would be burglary in the mansion house of A, there being but one common entrance to him and the lodger. But if the cellar alone had been leased, then clearly no burglary could have been committed in it. This distinction was adopted in Gibson's case. He was indicted for burglary in the dwelling-house of Thomas Smith, and stealing the goods of John Hill. Smith owned the house and lived in it; to it a shop was adjoining, built close to the house, but no internal communication between them, and no person lay in the shop; and the only door to it was in the court-yard, and before the house and shop, which yard was inclosed by a brick wall, three feet high, including both house and shop. Smith let the shop, with some apartments in the house, to Hill, from year to year, at a rent. There was only one common door to the house, which communicated both to Smith's and Hill's apartments. A gate, fastened by a latch in the wall of the court-yard next the road, served as a communication both to the house and shop. The burglary was committed in the shop.—Objected it was not Smith's dwelling-house; but all the judges held it was

Reg. v. Gibson, A. D.  
1785.

his dwelling-house, and the indictment well laid, as he lived in the house, and but one outer door to all parts of it, and especially as it was within one curtilage; and that the shop being let with a part of the house to Hill, inhabited by him, still continued a part of it, and of the dwelling-house of Smith; but admitted, that if the shop had been leased by itself, Hill not dwelling therein, burglary could not have been committed in the shop, as then it would have been severed from the house.

CH. 212.

Art. 11.

§ 20. The entry must be with intent to commit a felony; and if it be only to commit a trespass, as to beat one &c. it is not a burglarious entry, though a felony after the entry be committed. 4 Bl. Com. 228. Nor is the entry burglarious, if to take goods seized by an excise officer, and for the benefit of the owner.

East's C. L.

509, 511.—

1 Hale, 559.

§ 21. The offence must be laid to be done *feloniously* and *burglariously*; this word is technical;—so that the deft. *broke* and *entered* the house, and it must be laid to be a *mansion* or *dwelling-house*. This rule does not apply to a church; but it may be laid in *the parish church of D* &c. If the burglary be in an out-house, in law a part of the dwelling-house, it must be laid to be done in the dwelling-house, or in the stable, &c. alleging it to be a part of the dwelling-house; and in either case, the jury must find it parcel of the dwelling-house. But the indictment need not state any person was in the house; and as above, it must accurately state whose house it is. So it must state the hour of the night, though the evidence need not strictly correspond with the hour stated;—so it must state a felony was committed in the dwelling-house, or that the deft. broke and entered, with intent to commit a felony within the same, and this intent must be proved. Therefore, where he entered with intent to cut the sinews of the fore-leg of a horse, to prevent his running in a race, though he died, held not burglary; though the deft. did, in fact, commit a felony, by destroying the horse; for his intent, in entering, was only to commit a trespass,—and he was again indicted for killing the horse, and capitally convicted. Whatever be the felony intended, it must be laid in the indictment, and proved agreeably to the facts laid. One was indicted for burglary and stealing goods, where none were stolen; but there was an intent to steal, and not being so laid, the deft. was acquitted. So bad, if laid he entered with intent to commit one kind of felony, and it is proved he committed another kind. And 1 Hale, 561. But if the intended felony be actually committed, it is sufficient to lay the breaking and entering to be with intent to commit it. So the true owner of the goods stolen must be accurately stated. 2 Leach, 896, A. D. 1796. But stating a

East's C. L.

512, 513, 514

White's case.

Waddington's case.

Dobbs' case.

Rex v. Le-cost &amp; al.

CH. 212. felony actually committed, is sufficient evidence of the intention. 1 Hale, 560. But the same fact may be laid with

Art. 11. several intents, as entry with intent to steal A's goods in the first count, and in the second with intent to kill and murder A; *secus*, if two distinct felonies be committed and and charged in the several counts.

East's C. L.  
515, 516,  
Rex v. With-  
al & al.

§ 22. Different offences charged and joined in the same indictment, and severed by the verdict;—and the indictment may include other offences than burglary, but connected with it;—and the prisoner may be acquitted of part, and found guilty of the rest. As if the prisoner be charged that he feloniously and *burglariously* broke and entered the dwelling-house of A, and then and there certain goods of A feloniously and *burglariously* did steal &c.; this indictment comprises two offences, viz. burglary and larceny; and he may be acquitted of the burglary, and found guilty of the larceny only, if so be the evidence. Not *e contra*, for as the case is stated, the stealing makes a part of the burglary; but if the burglary be charged with entering, with intent to steal, and also the particular felony or larceny be laid, then if acquitted of the larceny, he may be found guilty of the burglary, as there is one complete without the stealing. *Quare* if three offences can be laid in one indictment.

East's C. L.  
519, A. D.  
1796, Rex. v.  
James.

§ 23. *Auter foits acquit* cannot be pleaded unless the facts charged in the second indictment, if true, would have supported the first indictment. As if the deft. be indicted for burglary in breaking &c. and stealing the goods of A, and of B, and of C, and acquitted; he may be indicted again for burglary in the same dwelling-house, on the same night, with intent to steal the goods of A and B, and cannot plead in bar the acquittal.

13 Mass. R.  
245, 247,  
Common-  
wealth v.  
Cunningham  
& al.

§ 24. Indictment for assaulting Mary Gove, and wounding &c. that her life was put in great danger;—plea in bar, and stated a process before a justice of the peace on the complaint of her and her husband for the same assault and battery, and the acquittal of the defts.; and profert made of a copy of the justice's record, averring the assault &c. in said process, and those in said indictment are the same &c.; held, the plea was good.

1 Johns. R.  
66, 77, The  
People v.  
Barrett &  
Ward.—Ch.  
193, a. 36,  
s. 2.

§ 25. One convicted where a juror is improperly withdrawn, may be tried again &c. As where the defts. were indicted for a conspiracy and brought to trial, and some evidence being not then to be had, on motion of the district attorney, a juror was withdrawn without the consent of the defts.; at a subsequent day they were again arraigned, tried, and found guilty on the same indictment. Judgment arrested, for the cause above.—Again indicted for the same offence,

and pleaded *autrefois acquit*, and the district attorney replied, *CH. 212. nul tiel record*; held, as the first indictment was erroneous, *Art. 11.* the plea of former acquittal was no bar to the second. The former, of the first indictment &c. was for cheating by conspiracy one O. D. by falsely persuading him to buy a note of Medad Gun as good, and he solvent, when not, and on his sole credit &c. Argued for the people the former indictment was erroneous, and not for the same offence. Tompkins J. held the offence in both indictments the same, and the plea good, because acquitted by what the court deemed equivalent to a general verdict;—examined Vaux's case, 4 Co. 44; 2 Hale, 247, Cogan's case; 2 Leach, 503 &c. Spencer J. held the plea bad, and relied on Vaux's case,—see this case, Ch. 221, a. 8, approved by Hale, 2 vol. p. 248;—and the first indictment bad, for want of a venue &c. Thompson J. agreed with Spencer,—relied on 2 Haw. c. 25, s. 8 & 63; 5 D. & E. 162. Livingston J. agreed with Tompkins. Kent C. J. with Spencer and Thompson, as to want of a venue as to a material fact.

## CHAPTER CCXIII.

### FORGERY.

ART. 1. Forgery is generally a crime affecting individuals. *Forms, Cro. C. C. 376 to 432.—4* It is a crime at common law, and by the statutes of the United States, and by those of each State. It is a crime so often committed in the United States, that the cases of forgery, *Wentw. 22 to 39.—6 Wentw. 370, 371.* in which alone law questions have been made, have been very numerous in the last ten or fifteen years, as will appear in this chapter. Intimately connected with this crime of forgery is the crime of passing, knowingly, forged and counterfeited paper, in the form of promises, contracts, evidence, or some other form. It has ever been a species of the *crimen falsi* that has ruined the credit of the person guilty of it. To *forge* originally meant to *make* or *form*, and was borrowed *3 Inst. 169.* from the smith's occupation.

ART. 2. *What is forgery or not.*

§ 1. According to Blackstone, and the eminent law writers *4 Bl. Com. 245.—East's C. L. 940 to 1008.* from whom he adopts his definition, "*forgery, or the crimen falsi*"

CH. 213. *falsi* is, at common law," "the fraudulent making or alteration of a writing, to the prejudice of another man's right," for which, at common law, a man may suffer fine, imprisonment, and pillory.

Art. 2. § 2. This was an indictment for fabricating and counterfeiting a bank bill, of £520. The jury found a note for £220, and that the deft. erased and altered said note by turning the word *two* into the word *five*. Held, this was a plain forgery, if not a counterfeit, and *fabricavit* would denote as much.

Stra. 19, 20,  
Rex v. Dawson.—M'Nally, 439, 442.

§ 3. But it is not forgery for one to alter a paper that injures himself only, as for the obligee to lessen the sum in the bond, for this is not to the prejudice of another's right, an essential part of forgery.

Salk. 376,  
Rex v. Knight.

§ 4. Held, in this case, that if a bill of exchange payable to A or order, get into the hands of another person of the same name as the payee, and the same person knowing he was not the real person in whose favour the bill was drawn, endorse it, he is guilty of forgery; and on argument evidence was admitted to prove that the *Henry Davis* who so endorsed it, was not the *Henry Davis* in whose favour it was drawn.

4 D. & E. 28,  
33, Mead v. Young.

§ 5. A possibility of a prejudice is enough to make forgery. This was an information against John Ward, Esq. for forging an order, at common law. The information charged, that Mr. Ward, *existens onerabilis*, to deliver to the Duke of Bucks 315½ tons of allum, at a certain day past, did, with intent to defraud him of it, forge an endorsement on the back of a certificate, in the words and figures following: "Mr. John Ward, I hereby order you to charge 660½ tons of allum to my account, part of the quantity here mentioned in this certificate, and for your so doing this shall be your discharge.

2 Stra. 747,  
749, Rex v. Ward,—  
East's C. L. 861, 862.

April 30, 1706.

BUCKINGHAM."

On not guilty pleaded, verdict guilty. Motion in arrest of judgment; on the ground, mainly, that this was not a paper of which a forgery could be committed at common law, as this was laid, not being a record, or matter of a public nature, deed, or will;—and relied on Hawkins, 182. The court held it a forgery at common law; and cited the *Queen v. Travers*, for forging an endorsement on an army debenture, and said, as at common law, "here would have been a prejudice if the forgery had stood." Sentenced to the pillory, fine £500, and sureties for seven years. And this case, and 2 Ld. Raym. 1461, forging any writing by which another person might be prejudiced, was punishable at common law as a forgery, though no one actually prejudiced.

§ 6. In this case, (see civil action in it, ante,) a bill of exchange was drawn in favour of Wilkinson & Cooke, who endorsed it to the plts., on the deft., who accepted it, March

4 D. & E. 320,  
345, Masters & al. v. Miller.

26, 1788. The date was altered to March 20, 1788, while in the payee's hands, without the deft's. privity, by some unknown person. A majority of the court thought this a forgery. CH. 213.  
Art. 2.

§ 7. It has often been decided, that drawing, endorsing, or accepting, a bill of exchange, in a *fictitious* name is a forgery. Leach, 78, 159, 192; and East's C. L. 958. And so it is a forgery to fabricate a will, by counterfeiting the name of the pretended testator, who is still living. 4Bl. Com.  
Chris. notes,  
26, Bolland's  
case.—Co-  
gan's case.

§ 8. So it is a forgery at common law if the party erase words out of a deed; or if he falsifies a copy of a deposition upon record, by erasing the words (*that did*) whereby the deposition is made more positive. But it is no forgery to write a will for a person *non-sane*, and deliver it to him; but a misdemeanor if he knew it;—cites Mod. 760. And an indictment lies for forgery at common law. 4 Com. D.  
230, 231.

§ 9. Indictment at common law for forging a writ of *fieri facias*, whereby one's goods were taken in execution. This indictment was sustained, and the deft. fined £100, and put in the pillory; the indictment contained two counts, and stated the proceedings at large. Cro. C. C.  
376 to 433.—  
1 Haw. 162.  
—11 Co. 27.  
—1 Rol. Abr.  
28, 29.

§ 10. So a writing may be said to be forged, where the hand and seal of no one is forged: as where one is directed to write a will for a sick person, and of his own head inserts some legacies in it. Or where A finds B's name at the bottom of a letter, and cuts it off, and writes a release &c. over it. So where one inserts in an indictment the names of persons against whom it is not found; or where one makes a fraudulent alteration in a true deed, in a material part of it, as by making a lease of the manor of Dale appear to be of the manor of Sale, by changing the letter D into S; or by making a bond of £500, expressed in figures, appear to have been made for £5000, by adding a new cypher. According to Hawkins, 182, 183, 7th ed. vol. 2, p. 103, &c. the notion of forgery does not so much consist in counterfeiting a man's hand and seal, which may often be done innocently, but by endeavouring to give an appearance of truth to a mere deceit or falsity, and either to impose that on the world as the solemn act of another, which he is no way privy to, or at least to make a man's own act appear to have been done at a time when it was not done, and by force of such a falsity to give it an operation which in truth and justice it ought not to have. But he who writes a deed in another's name, and seals it in his presence, and by his command, is not guilty of forgery, because the law looks upon this act as the other's own sealing. Nor is it forgery merely to write a will in one's name, without his direction, where there is no execution of it; for there be And 3 Inst.  
169, 170, 171.

CH. 213. ing no execution, no false appearance is given to it to deceive any person. If one, in writing another's will, barely omit a legacy &c., directed by him to be inserted, it is not a forgery generally; but is, according to many opinions, if thereby the estate of another is materially increased. As where the testator directed an estate to be given to A for life, remainder to B in fee, but the writer of the will of his own head, and without the testator's privity, omits the life estate to A, whereby B has the whole estate, presently; this is forgery in the writer of the will. See Moore, 760; Noy, 101.

1 Haw. 184.  
—1 Sid. 142.  
—Cro. C. C.  
395.

§ 11. It is not material whether a forged instrument be so made, that if true as counterfeited, it would be valid or not. On this ground if A forge a protection in B's name, as being a member of Parliament, who is not one, this is as much a forgery as if he were one. And a forgery may be committed by making a mark in the name of another person.

2 Bac. Abr.  
566, & cases  
cited.

§ 12. It is a forgery if a man make a feoffment of certain lands to J. S., and afterwards make another of the same lands to J. D., and date it before that to J. S.; for herein he falsifies the date of his deed to defraud J. S., which he has no power to do. And so if by the first conveyance only an *equitable* estate pass for a valuable consideration.

See *Commonwealth v. Mycall*; where held, there must be a technical description of forgery in every indictment.

*Late cases.* According to the late decisions as well as ancient, forgery on common law principles means a false making, a making *malò animo*, of any written instrument, for the purpose of fraud and deceit, that may prejudice some person or corporation; and includes every alteration in, or addition to a true instrument. The ancient writers gave various definitions of this crime, which by later decisions have become quite useless. Even Hawkins' definition is very confined. Blackstone's is the best general one, but his is incorrect in supposing an actual prejudice of another's right. So when Buller J. in Cogan's case said, it is "the making of a false instrument with intent to deceive," he used words that embraced but a small part of the crime. The same observation may be made as to the opinions of Grose J. and Eyre B. This offence so often made capital in modern times was punishable but as a misdemeanor at common law. Fraud and deceit are of the very essence in an intent to deceive to another's prejudice. Therefore, where A gave a bond to B to pay him twenty pounds, and B altered it to twenty marks, adjudged no forgery, because B by lessening the sum could have no fraudulent design to cheat another. If his alteration had any effect, it vacated the security to B, and so prejudiced only him who made the alteration at any rate; but even lessening the sum

3 D. & E.  
181.—1 Haw  
ch. 70, s. 4,  
27.—1 Hale,  
663.—3 Bac.  
Abr. 278, 279.

&c. may be a forgery if done to gain an advantage, or to prejudice another. But, as above observed, it is enough another may be prejudiced by the forgery, for forgery is complete even before publication, and so before any one is in fact injured. A forgery may be by making a bill in favour of a fictitious payee and endorsing it in his name, as Ch. 20, s. 14, s. 2. So by one's making a false deed in his own name: as if A make a deed to B of land, July 1; and July 4th, make another of the same land to C, and dates it before July 1st. So attempting to give the last deed effect in order to defraud B by antedating it.

Ch. 213.  
Art. 2.

2 East's C. L.  
855.

§ 13. A procured a deed to be forged as from B and D, conveying certain estate for life to C, and after the death of one of the supposed grantors, A procured the forged deed to be altered by enlarging the grantee's estate to a fee; held, forgery by all the judges; for it was no less a forgery after, than before such alteration. But it is no forgery to assume another's name, and to pass for the person whose endorsement is on a bill, and thereby to obtain credit in his name. A endorsed the bill in fact, and Hevey passed himself for A,—no forgery, because no false endorsement, the jury having found A endorsed the bill. But afterwards Hevey and his associates were indicted for a conspiracy, and convicted of a conspiracy to defraud. See the form of the indictment.

A. D. 1800,  
East's C. L.  
855, 856, case  
of Kinder.

Hevey's case.

§ 14. How far the forged writing ought to resemble the true one &c. If the forgery consists in counterfeiting any other known instrument or writing, it is enough the resemblance be so like or similar as to be calculated to deceive persons of usual and common care. So in counterfeiting coins and seals. Hence, where the word, *pounds*, and the watermark words, "*Bank of England*," were omitted in the body of a forged bank-note, the paper of which was also thicker than ordinary, yet a forgery of a promissory note to pay money, the word *pounds* was supplied by the "£ fifty" in the margin. But it is no forgery to counterfeit letters or writings, frivolous or of no moment, or from whence no damage could ensue, or of uncertain signification. The true rule is now settled in *Rex v. Ward*, ante a. 2, s. 5.

East's C. L.  
858, 859, El-  
liot's case,  
and 860, 861,

§ 15. Fawcett was confined in prison under an attachment for contempt of court, (B. R.) not for not paying money; this was a civil cause. He counterfeited a pretended discharge as from his creditor to the sheriff and gaoler, under which he obtained his discharge from gaol. He was indicted for a misdemeanor at common law. Held, a misdemeanor at common law, though the attachment not being for not paying money, the order was in itself a mere nullity, and no warrant to the sheriff for the discharge;—and seems also indictable as a for-

Fawcett's  
case, A. D.  
1793, East's  
C. L. 862,  
864.



CH. 213. gery. All the judges held, the offence was indictable as a misdemeanor at common law; and a great majority also thought it was forgery at common law.

Art. 2.

3 P. W. 419,  
Rex v. Bigg.

§ 16. Bigg was indicted for rasing out an endorsement of £90, made on a bank bill for £100 made by the agent of the bank: Held, the prisoner's expunging the words and figures following "22d February 1714, paid £90," written with red ink upon the face and inside of the note with a certain liquor unknown, sustained the indictment; though objected among other things, that the receipt on the face of the note could not be called an endorsement; that taking it out by a liquor could not be called a rasing; and that the verdict did not find the rasure to have been for the sake of lucre, or to defraud the company. Ten judges held it felony and forgery.

Dougl. 302.—  
1 Leach, 243.  
—East's C. L.  
883, 884.

§ 17. The indictment charged the forging a paper writing, purporting to be a bank note; and held, the resemblance must appear on the face of the instrument, and cannot be supplied by what the prisoner said that it was. Also held, that the signature being for self and Co. of my bank in England, had no such purport; and this instrument forged had not the principal constituent parts of that which it was intended to represent, so the thing itself was no resemblance of that which it was charged to be, or of that meant to be imitated.

A. D. 1791,  
case of  
Clinch, 2  
Leach, 261.

§ 18. Clinch was indicted for forging an order for the delivery of goods, purporting to be signed by one who was alleged to be the owner's servant; but it was not stated such servant had power to make such order. Indictment adjudged bad. The order did not purport to be drawn by one who had any interest in, or power to dispose of the goods, nor was it directed to any one; but it is enough such order purport the drawer has such power, though in fact he has not. Though the case was on a statute, it clearly involved in it general principles; for an order to deliver goods, on the face of it coming from one who does not claim any interest in or power over them, can deceive no one, and ought not to be accepted. What instrument may be declared on in an indictment as an order to pay money. East's C. L. 940, &c. Among others, a bill of exchange may be laid as an order for the payment of money. 944. So a banker's draft. Id.

A. D. 1802,  
Rex v. Hoost,  
East's C. L.  
950, 952.

§ 19. To constitute forgery it is not necessary there should be a perfect resemblance between the forged instrument or writing, and that meant to be imitated; if so much alike that the deception is calculated to impose upon persons in general, it is sufficient, though it would not deceive those particularly experienced in such matters. As where a person from a bank who proved the forgery said, that he could not have been imposed upon by the counterfeits, the difference between those

and the true notes being to him so apparent in several particulars pointed out by him ; but in the same case it appeared that others had been deceived at first by them, though the counterfeits were very ill executed. And on this distinction cases have been decided. But though a similarity to a common intent may do, yet it is necessary that the forged instrument in all essential parts should have upon the face of it the similitude of a true one ; so that it be not radically defective and illegal in the very frame of it. Therefore, Reading being indicted for forging a bill purporting to be directed to John King by the name of John Ring, and the bill being directed to John Ring and the acceptance by John King, and being laid the prisoner forged the acceptance by the name of John King, the deft. was acquitted, because Ring could not purport to be King.

CH. 213.

Art. 2.

Jones' case.

Reading's case.

§ 20. So where Thomas Wall was convicted on an indictment for forging, and knowingly altering a will of land of A deceased, attested only by two witnesses, and so was the evidence, it might be presumed A's estate in the land was a freehold, so the will clearly void by 29 Ch. II. for want of three witnesses, the judges held the conviction wrong. Moffat's case was decided on the same principle, that is, the bill forged was void, and so would have been one truly drawn in the same form. As where the law requires a bill to be witnessed to be valid, and the forged one is not, it deceives no one, as every one who knows the law sees at once it is void. But a forgery may be committed of a bill of exchange on unstamped paper, as one not stamped is not to all intents void, and besides the holder may get it stamped after made. So of a note on unstamped paper, even where a statute forbids the stamp to be affixed afterwards. The report states Morton was indicted for knowingly uttering a forged promissory note, as it appeared at the trial, on unstamped paper ; that this case underwent much consideration, and was debated by the judges in Michaelmas term 1795, and in Hilary and Easter terms 1796, on the principal point, as well as upon the question, whether the statute of 31 Geo. III. c. 25, s. 19, passed after Hawkeswood's case, and prohibiting the stamp to be affixed afterwards, had made any difference ; and that that case was allowed to be an authority in point and governed this case, *Rex v. Morton* ; and that the judges held the act 31 Geo. III. made no difference, " for the only thing to be regarded was the state of the note at the trial, and not what might be its state afterwards." " And most of the judges maintained the principle of Hawkeswood's case to be well founded ; for they held, that the acts of parliament which had been referred to and relied on, being mere revenue laws, meant to make no

A. D. 1800.  
Wall's case,  
East's C. L.  
953, 954, 955.  
—1 Leach,  
292, Moffat's  
case.

Hawkes-  
wood's case.  
A. D. 1796,  
*Rex v. Mor-*  
*ton.*

CR. 213.

Art. 2.

alteration in the crime of forgery, but only to provide that the instrument should not be available for the purpose of recovering on it in a court of justice ; but it might be received in evidence for a collateral purpose, and instances of this might occur under the 6th section of the statute 31 Geo. III. 8, by which persons drawing bills on unstamped paper were chargeable with the duties ; and also, under the 10th section of the same act by which they are made liable to a penalty of £20, in both of which cases the note or bill must be used in evidence :” “ that it was not necessary to constitute forgery that the instrument be available, that though a compulsory payment by course of law could not have been enforced for want of the proper stamp, yet a man might equally be defrauded by a voluntary payment being lost to him : that if this were a sufficient defence, forged securities might be published on improper stamps with impunity, which would carry the mischief to an alarming extent ; that the stamp itself might be forged, and it would be a strange defence to admit in a court of justice that because a man had forged the stamp he ought to be excused for having forged the note itself, which would be setting up one fraud in order to protect him from the punishment due to another.” This case is thus minutely stated in order to shew what various and minute interests of him whose instrument is forged ; what various and remote prejudice to him ; what considerations as to revenue laws and matters of policy, have in the late decisions got worked into the materials, which of late years constitute forgery, in carrying into execution the scores of modern English statutes relating to this crime, as well as the many scores relating to larceny and robbery, and to cheats, deceits, and frauds,—subjects before considered.

This case decided three others ; 3 Leach, 811, *Rex v. Roberts* ; and *Rex v. Davies*, A. D. 1796 ; and the same principle was again recognised in Michaelmas Term, 1802, in Teague’s case, as the 31 Geo. III. charged duties on bills and notes, drawn truly (not counterfeited) on unstamped paper by one, (as well as a penalty,) a person might clearly be prejudiced by having such bill or note counterfeited in his name, therefore clearly interest and prejudice sufficient to constitute forgery, without resorting to revenue laws, public policy, or voluntary payment. And if these three vague considerations had been omitted, would not the decisions in these several cases have been much more certain, and so much more useful.

*Rex v. Shepherd*, 1  
Leach, 265.

§ 21. *Forgery in fictitious names or false characters assumed.* John Shepherd was indicted for forging an order for the payment of money with the name of H. Turner subscribed to it, with intent to defraud James Elliot. The order was to

pay John Atkins or bearer six guineas, and was directed to Brown, Collinson, & Co. subscribed as above. The prisoner came to Elliot's shop, and after selecting articles of silver as a buyer, said he had not cash enough to pay &c. but had a draft on a banker, the same thing, and would be paid when presented. Elliot observing it was on a house he knew, took it, the sum being small, and the prisoner having a good appearance. He then desired Elliot to send him a pair of spurs. He took down the prisoner's direction, and supposing his name H. Turner, as on the order, (for he said he viewed it as *his* draft,) he wrote down H. Turner, the prisoner looking over him as he wrote, and said he must add Junior, Noah's Row, Hampton Court; he then went away. Draft was refused, as no H. Turner kept cash with the banker; and Elliot could not find any such person as H. Turner, or place as Noah's Row.—Held, forgery; for it was a false instrument, not drawn by any such person as it purported to be, and the using of a fictitious name was only to deceive. In this case, that of *Rex v. Taylor*, that of *Rex v. Lockett*, and that of *Rex v. Dunn* were relied on, decided on the same principles. Taylor gave a receipt on a bill by the name of "W. Wilson;" and Elizabeth Dunn made a note by the name of "Mary Wallace," with intent, as laid in the indictment, to defraud Edward Hooper, to whom she made it. The indictment stated the note *verbatim*, including the name of the witness at the end, also the words, "*Mary Wallace, her mark*;" held, well laid, though proved that those additions were made after the prisoner had subscribed the note, but at the same time. Adjudged forgery.

CH. 213.  
Art. 2.

East's C. L.  
960, 967,  
*Rex v. Dunn*.

§ 22. Mathias Parkes and Thomas Brown were indicted for forging and uttering a note signed Thomas Brown, for Self and Co.; the jury found Parkes made and signed the note by Brown's consent. Afterwards Brown falsely and fraudulently put it off as his brother's note to one Hulls for shoes, falsely representing his brother as being rich &c. and deceived Hulls. Parkes was acquitted on the ground it did not appear when he made the note he knew what use Brown intended to make of it; but Brown was adjudged guilty of forgery, because he uttered the note as the note of another falsely, when not another's note, but his own &c.; and his uttering it in the same name as his own, could make no difference. Grose J. in delivering the opinion of the court, after noticing the four objections made by the prisoner's counsel, observed, that forgery was "the false making a note or other instrument with intent to defraud," which might be done either by using the name of one who did not exist, or of one who did exist, without his consent; that this was of the former

2 Leach, 896,  
909, *Rex v.*  
Parkes &  
Brown, A. D.  
1797; cited  
East, 963,  
966.

CH. 213. description, being uttered by the prisoner as the note of his brother, no such person as his brother of that name appearing to exist. Second objection was, that it was no forgery to sign the name by Parkes of Thomas Brown, by his consent. But the court said, as no such person existed to whom the name of Thomas Brown, as the signer of the note, applied, there could be no consent given to sign the name. It was signed by the authority of a Thomas Brown, but not of *the* Thomas Brown, for whose note it purported to be given. For the person in whose name the note was made, was, according to the description of him in the note, then a resident at Rington in Salop, (at which place the note was dated,) and it imported that he was a correspondent of Down, Thornton, & Co., and had money in their hands; and was also represented to be the prisoner's brother. But no such person of that name and description appeared to exist; and that as this was proved and found to be done for the purpose of fraud. Third objection was, that the indictment did not charge that Brown uttered the note knowing it to have been forged by Parkes, but only knowing it to have been forged. But the court said, let it have been forged by whomsoever it might, it was equally an offence in Brown to utter it. The note was in these words, to wit:—

"No. 248 B Rington, Salop, 20th of April, 1796. I promise to pay to bearer on demand, at Messrs. Down, Thornton, & Co. London, the sum of five guineas for value received: for self & Co.

Five guineas.

THOMAS BROWN.

Entered T. B."

Also see *Rex v. Powell*, one personating another in the sale of his goods and using his name, a 6. s. 20.

ART. 3. *What is forgery or not on acts of Congress.*

Act of Congress, April 30, 1790.

§ 1. By sect. 14 of this act it is enacted, "if any person or persons shall falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or willingly act or assist in falsely making, altering, forging, or counterfeiting any certificate, indent, or other public security of the United States, or shall utter, put off, or offer, or cause to be altered, put off, or offered in payment, or for sale, any such false, forged, altered, or counterfeit certificate, indent, or other public security, with intention to defraud any person, knowing the same to be false, altered, forged, or counterfeited, and shall be thereof convicted, every such person shall suffer death."

§ 2. Sect. 15 enacts, "if any person shall feloniously steal, take away, alter, falsify, or otherwise avoid any record, writ,

process, or other proceedings in any of the courts of the United States, by means whereof any judgment shall be reversed, made void, or not take effect; or if any person shall acknowledge or procure to be acknowledged in any of the courts aforesaid, any recognizance, bail, or judgment, in the name or names of any other person or persons, not privy or consenting to the same;”—punishment fine not exceeding \$5000, and imprisonment not above seven years, and whipping not above thirty-nine stripes. “Provided, nevertheless, that this act shall not extend to the acknowledgment of any judgment or judgments by any attorney or attorneys, duly admitted for any person or persons against whom any such judgment or judgments shall be had or given.”

CH. 213.  
Art. 3.

§ 3. Sect. 26 of this act enacts,—“every collector or officer, who shall knowingly make, or be concerned in making any false register or record, or shall knowingly grant, or be concerned in granting any false certificate of registry or record of, or for any ship or vessel, or other false document whatsoever touching the same:” “and every surveyor or other person appointed to measure any ship or vessel, who shall wilfully deliver to any collector or naval officer a false description of such ship or vessel to be registered or recorded, shall, on conviction,” forfeit \$1000, and be rendered incapable of serving the United States in any office.

Act of Congress, Dec. 21, 1792.

§ 4. Section 28 enacts, “and if any person or persons shall forge, counterfeit, erase, alter, or falsify, any certificate, register, record, or other document, mentioned, described, or authorized, in and by this act,” forfeits \$500.

§ 5. By section 30 of this act, it is enacted, “if any person or persons, forge, counterfeit, erase, alter, or falsify, any enrolment, license, certificate, permit, or other document, mentioned or required in this act, to be granted by any officer of the revenue, such person or persons, so offending, shall forfeit \$500.”

Act of Con. Feb. 18, 1793.

§ 6. Section 32 enacts, that if any person “shall be found with a forged or altered license, or one granted for any other ship or vessel, every such ship or vessel, with her tackle or furniture, and the cargo found on board her shall be forfeited.”

§ 7. As to forging gold or silver coins, by act of 1806, or bank-bills by act of Congress 1807, see Ch. 200, a. 3 & 4.

§ 8. Section 10 of this act, provides against falsely making, forging, or counterfeiting, or causing or procuring the same, or aiding therein, any treasury notes, in the same manner said act of April 30, 1789, provides as to public securities &c.; and adds, “or shall pass, utter, or publish, or attempt to pass, utter, or publish, as true, any false, forged, or counterfeited note, purporting to be a treasury note as aforesaid, knowing

Act of Con. June 30, 1812.

CH. 213. the same to be falsely forged or counterfeited, or shall pass,  
 Art. 4. utter, or publish, or attempt to pass, utter, or publish as true any falsely altered treasury note, issued as aforesaid, knowing the same to be falsely altered," every such offender, on each part of this section, is adjudged guilty of felony, and to be imprisoned and kept to hard labour, not less than three, nor above ten years, and fined not above \$5000.

§ 9. There does not appear to have been any constructions of these statutes of any material importance; but generally being worded in the language of the common law, they must have the like constructions as have been given upon cases arising under that law. However, in practice, no doubt many questions will arise as to the various kinds of documents, instruments, and writings, named in these acts, whether of this description or of that description of them, or not.

ART. 4. *What is forgery or not, on Massachusetts statutes.*

Mass. Act,  
 Mar. 15, 1806,  
 or stat. 1804,  
 c. 120.—  
 Maine Act,  
 ch. 11.—Ken.  
 Act, Dec. 19,  
 1801, s. 23,  
 37, peniten-  
 tiary 2 to 10  
 years.

§ 1. Section 1 of this act. (laws of March 16, 1785, and Nov. 1, 1785, revised,) enacts, "that if any person shall falsely make, alter, forge, or counterfeit, or shall procure to be falsely made, altered, forged, or counterfeited, or shall willingly aid or assist in falsely making, altering, forging, or counterfeiting any public record, any certificate or attestation of a justice of the peace, public register, notary public, clerk of any court, town-clerk, or other public officer, in any matter wherein such their certificate or attestation is receivable, and may be taken as a legal proof; any charter, deed, will, testament, bond, or writing obligatory, letter of attorney, policy of insurance, bill of exchange; any promissory note, order, acquittance, or discharge, for or upon the payment of money, or delivery of goods; or any acceptance of a bill of exchange; or any endorsement or assignment of a bill of exchange or promissory note for the payment of money; any accountable receipt for money or goods, or for any note, bill, or security, for money or goods; or any lottery ticket in any lottery legally authorized and licensed within the Commonwealth; or shall utter or publish as true, any such false, altered, forged, or counterfeited record, certificate, attestation, charter, deed, will, testament, bond, or writing obligatory, letter of attorney, policy of insurance, bill of exchange, promissory note, acceptance, endorsement, assignment, order, acquittance, discharge, accountable receipt, or lottery ticket, knowing the same to be false, altered, forged, or counterfeited, with intent to injure or defraud any person, or body politic, or corporate, then every person so offending, in either of the particulars aforesaid," on conviction in the Supreme Judicial Court, shall be punished by solitary imprisonment not exceeding six months, and by confinement afterwards to hard labour not less than two, nor more than ten years.

§ 2. Section 2 provides against counterfeiting, in like manner, any note, certificate, or bill of credit, for any debt due from the Commonwealth, or any bank-bill issued by any legal corporation in the same,—but confinement for life.

§ 3. Third section punishes passing the same knowing the same to be false, altered, forged, or counterfeited, with intent to injure &c. ; punishment, solitary imprisonment not above thirty days, and hard labour not above three years, or fine not exceeding \$1000, &c. Punishment for repeating the offence is increased, &c.

§ 4. Section 4 punishes offenders, for bringing into this State, and for having in his possession, in this State, any false, forged, or counterfeit bank-bill or bills, issued by any bank established in this State, or in any part of the United States, to render the same current, or with intent to pass the same, knowing, &c.—with solitary imprisonment not above three months, and hard labour not above three years, or fine not above \$1000, and imprisonment in the common gaol not above a year.

§ 5. Section 5 punishes the making or mending any tools, &c. to be used in counterfeiting bills, and for being possessed of the same, as to any of said banks, with intent so to use them, with confinement &c., as in the fourth section nearly.

§ 6. This act of 1805, very much enlarged upon the acts of 1785, especially as to bank-bills. The acts of 1785, were a revision of the Province laws, as to forgery, of 1692, but enlarged and expressions varied. This act of 1692, was a revision of the Colony act against forgery, passed in 1646, and was in these words: "that if any person shall forge any deed of conveyance, testament, bond, bill, release, acquittance, letter of attorney, or any writing to prevent equity and justice, he shall stand in the pillory three several lecture days, and render double damages to the party wronged, and also be disabled to give any evidence or verdict to any court or magistrate." The act of 1692, added cropping, and imprisonment one year; also punished *offering* any such forged instrument in evidence, in the same manner.

§ 7. As Massachusetts thus early passed statutes of her own against forgery, every idea is excluded of her adopting the English statutes on this subject. But as the act of the Colony, especially, did not at all define forgery, it was left to the rules of the common law, to ascertain the meaning of it; and what was forgery or not was left to be ascertained by that law. The French manner of describing forgery deserves attention, French Penal Code, art. 145 to 165, punishment for forging private writing, is confinement; public, hard labour and branding.

CH. 213.

Art. 4.

The act of  
Feb. 19, 1819,  
is respecting  
the evidence.  
Maine Act,  
ch. 11.



**CH. 213. ART. 5. American decisions as to forgery on the statutes, &c. ; forgery or not.**

Also, Commonwealth v. Ross.  
2 Johns. Ca. 342, The People v. Thompson.

§ 1. Several cases on this subject have been already stated, as Putnam & al. v. Sullivan & al; Commonwealth v. Snell, Ch. 90, a. 11; Fairfield's case, ch. 84, a. 2; Barnes v. Ball, Ch. 90, a. 10; Commonwealth v. Frost, Ch. 90, a. 11; Commonwealth v. Hutchinson. The deft. forged the following order:

"Sir—The bearer, Mr. Richardson, being our particular friend, having occasion to proceed from New York to Philadelphia, we have requested him to call on you, desiring you to accept his draft on us, on demand, for fifteen dollars. Your compliance will much oblige, Sir, your humble servants,

GIBBS & CHANNING."

The deft. was indicted for forging this order. Held, it was not forging an order for the payment of money within the statute of New York. But was so by an after one passed 24 Sess. c. 54.

6 Johns. R. 320, The People v. Wilson; Same v. Osborn.

§ 2. Held, it was not felony, in New York, to alter and publish a forged note of the bank of another State, for the payment of less than one dollar, after the statute of 30 Sess. c. 173, was enacted. Nor is a man's possessing such a note, intending to pass it, an indictable offence since the statute of 31 Sess. c. 155, s. 7.

5 Johns. R. 236, The People v. Shaw. —1 Leach, 63.

§ 3. The deft. forged this order, to wit:

"Mr. Seward, Sir, let the bearer trade thirteen dollars and twenty-five cents, and you will oblige yours," &c.

The deft. being indicted for forging this order, the court held it forging an order for the delivery of goods, within the statute; prisoner was sentenced to the state-prison.

5 Johns. R. 237, The People v. Finch.

§ 4. The deft. forged the following paper, for which he was indicted:

"Due, Jacob Finch, one dollar, on settlement this day," &c. Held, this was a forgery of a note for the payment of money, within the statute. Punishment, state-prison five years.

2 Mass. R. 138, Commonwealth v. Morse.

§ 5. The deft. was indicted, for that he falsely &c. obtained &c. possession of "one certain false and forged piece of paper, purporting to be a true and genuine promissory note of hand, for money issued by a corporation duly and legally established by law, under the denomination of the Richmond Bank, and which was of the tenor following, namely: [then stated the note.] And the indictment stated no such bank existed, and the deft. knew it. Held, this was no offence within the said statute of March 15, 1805.

10 Mass. R. 34, Commonwealth v. Hayward.

§ 6. The deft. was indicted, and it was alleged, he with force and arms, had in his custody and possession a certain bank bill or note, &c. Held, it is not an indictable offence to tear or cut a piece out of a bank note, with intent, with the

bill thus altered with such piece, together with other pieces of similar bank-notes altered, cut, and torn out to form other bank notes, with intent to utter the same, and thereby injure and defraud the company issuing the same. The court thought this was a non-descript offence. It was not forgery, as no writing was fabricated; nor cheating, as no one was prejudiced. CH. 213.  
Art. 6.

§ 7. Where a forgery to add the word *by order*. The deft. bought iron of Eveleth & Child, and they gave him the following paper: "Augusta, 13th of June 1811, Mr. John Ladd bought of Eveleth & Child, 2: 18 Swedes iron \$4.80; the above charged to Geo. Carpenter." Thereto the deft. added the words, "*by order, Eveleth & Child*," which bill the deft. afterwards produced in evidence, in a trial relative to the sale and delivery of said iron so altered. Deft. was indicted on our said statute of 1805, for forging an *acquittance*; held, the addition was material, for it discharged the deft. and made the charge to Carpenter valid as sanctioned by his order, so the deft's. acquittance: 2. Not necessary to allege any goods were delivered in consideration &c.: 3. The false making with intent to defraud, is the gist of the offence. See 3 Inst. 169; 2 East's C. L. 938. 951, 954, 989. 15 Mass. R.  
526, Commonwealth v.  
Ladd.

§ 8. It may be forgery to counterfeit the will of a person living, getting it proved and obtaining property under it; and on the trial Elizabeth Shutter, whose will was forged, was produced to prove that the signature to the will was not her handwriting. Held to be good law, on the authority of the case of Ann Lewis. M'Nally, 296,  
296, The  
King v. Sterling.

§ 9. Aiding in the act of counterfeiting is indictable on the statute, as is aiding &c. in making the implements for counterfeiting. Kirby, 62,  
The State v.  
Stetson.

**ART. 6. Indictment and evidence.**

§ 1. Bridge was indicted for forging and altering £10, endorsed by him as a deputy-sheriff on an execution into the sum of £9, and returning the said execution so altered. Plea, not guilty. The indictment recited a judgment recovered the second Tuesday of April 1790, and the execution recited judgment recovered the second Tuesday of April 1790, by adjournment. The court held, that this was a material variance; and that the execution could not be admitted in evidence to support the indictment. Then the Commonwealth withdrew a juror, that is, the last juror stepped off the stand, and on the call of the jury only eleven answered, and the grand jurors found a new indictment. Mass. S. Jud.  
Court. June  
1796, Lincoln,  
Commonwealth v.  
Bridge.

§ 2. This was an indictment for a forgery. June 12, 1800, the legislature incorporated the United Baptist Society in Russell, and authorized any persons in &c. to join it on producing 1 Mass. R.  
54, Commonwealth v.  
Stow.

**CH. 213.** a certain certificate signed by the minister or clerk of the society, that he &c. actually became a member. This exempted from taxes in the old parishes.

*Art. 6.*

The indictment stated the substance of the act, the formation of said society, that the deft. was elder and teacher and so empowered to sign certificates &c.; that the deft. under pretext of the act aforesaid, wickedly &c. intending to evade and to defraud the town of Montgomery of the taxes which might be legally assessed on the poll and estate of J. W. towards &c., did on — at — falsely &c. make a certificate directed to the town-clerk of Montgomery, in the words and figures following, viz: [here the certificate was stated omitting the date and direction to the town-clerk,] when in truth said J. W. did not belong to the said society, nor attended &c., of which the deft. was knowing &c. The court held, a strict recital was necessary on these words and figures &c., same as if the tenor had been alleged. Held, the government must prove the certificate false: 2. That the deft. knew it was so: 3. He meant to defraud.

1 Mass. R. 62, Commonwealth v. Bailey.—8 Johns. Cases, 299.

§ 3. The deft. was indicted for uttering a forged and counterfeit bill of the Maine Bank of \$5. Alleged the forged bill was in the words and figures following, viz: held, a strict recital is necessary as in the case above, but that the number of a bankbill and the figures in its margin, marking its amount, are not parts of the bill, and need not be stated in the indictment, the contract is complete without them.

1 Mass. R. 143, Commonwealth v. Hearsey.

§ 4. The deft. was indicted for forgery, by altering a word in the condition of a bond from six to eight. The indictment alleged the bond was dated October 15, 1802; bond produced was of the same date in the penal part; but at the close of the condition was written, given under my hand and seal, October 25, 1802. On objection court held no variance. Bond is a writing obligatory. East, 986.

1 Mass. R. 203, Commonwealth v. Stevens.

§ 5. Held, in this case of an indictment for forgery of \$30 Beverly bank-bill, the word, "*tenor*," binds the party to a strict recital; but that the number of a bank-bill and the words at the top of it expressing its amount, are not parts of the bill, and need not be stated in the indictment for forgery.

2 Mass. R. 397, Commonwealth v. Ward.

§ 6. The deft. was indicted for forging and uttering as true a promissory note, purporting to be the note of one Jonathan Ellis, payable to John Flanders or order. Held, the indictment need not allege the endorsement of the note though it be forged; it is no part of the note.

8 Mass. 59, Brown in error v. Commonwealth.—Indictment for passing counterfeit money, 4 Went. 53.

§ 7. This was an indictment on the second section of said act of March 15, 1805, for the deft's. having in possession ten or more counterfeit bank-bills, and knowing them to be forged,

he aided in making them current &c. Held, it was not a sufficient objection that it was alleged that such bills purported to be bills of such a bank; that they were payable to the bearer thereof; that they are not alleged to be similar bills; that they are described as promissory notes or bank-bills; or that it is not alleged that the party charged had knowledge of the false making &c. CH. 213.  
Art. 6.

§ 8. An indictment for forging must set out the forged instrument in words and figures. And East's C. L. 975, 976. 1 East, 180,  
Rex v. Ma-  
son.

§ 9. But on an indictment for publishing a forged receipt for money, with the name, Stephen Withers &c., for the sum of £1. 4s.; the receipt itself only was set forth as follows: "18th of March 1773, received the contents above, by me, Stephen Withers." It appeared in the evidence this was at the bottom of a certain account; it was objected that the account itself should have been stated. But all the judges held, the indictment sufficient, for the bill was only evidence to make out the charge. But 181, Rex  
v. Testick:  
East's C. L.  
977, cited.—  
And cases of  
Hunter and  
Taylor, and  
post.

§ 10. The deft. was indicted for having in his possession more than ten, viz. twenty-five false, forged, and counterfeit bank-bills on the above statute of March 1805. Held, it was necessary to describe the bills in the indictment, or to set forth in it a sufficient reason why not so described. 8 Mass. R.  
107, Com-  
monwealth v.  
Houghton.

§ 11. The words, "purporting to be a bank-note," mean that the note upon the face of it appears to be a bank-note, and the want of such appearance cannot be supplied so as to support the indictment by any representation of the party when he disposed of it. Forged or counterfeited implies falsely. Douglass 301.—  
East's C. L.  
992; and  
several cases,  
978 to 992.

§ 12. Agreeable to the rule, that the forged instrument must be set out in words and figures, the jury, in Douglas, 301, present that A. B. on — at — having in his custody a certain forged and counterfeited paper writing, purporting to be a bank-note, the tenor of which forged and counterfeited paper writing is as follows, viz: (then states it *verbatim*) feloniously disposed and put away the said forged and counterfeit paper writing, as and for a good and true bank-note, knowing the same to be forged and counterfeit, with intent to defraud James Rayner against the form of the statute &c. This rule seems to be without exception, and the only question seems to have been, what is a part of the writing, or contract, or certificate &c., as in the above cases. Douglass 301.

§ 13. This was an indictment against the deft. for disposing of and putting away a forged bank-note, he knowing it to be forged. Held, the government may give evidence that the deft. had uttered other forged notes in order to prove his knowledge of the forgery. New Rep. 92,  
Rex v. Wy-  
He.

CH. 213. § 14. The deft. was indicted for altering an order drawn by one Sturtevant on one Rufus Page, in favour of the deft.

Art. 6.

10 Mass. R.  
181, Commonwealth v.  
Stevens.

from five to fifteen dollars. The evidence was his confession that another person did it, the deft. knowing and assenting to the alteration. Held, sufficient evidence to warrant a conviction. This confession was to one Currier who testified in court. Objected the deft. only aided &c., answered, this is only a misdemeanor, in which there are no accessories, all aiding &c. are principals, and as the deft. alone was to be benefitted by the alteration the court thought, "they were justified in inferring that he procured it to be done." "The evidence is quite sufficient to satisfy the jury that the prisoner committed the crime, either with his own hand or by the hand of another."

2 Mass. R.  
132, Commonwealth v.  
Cone.

§ 15. Dft. was indicted on the act of March 15, 1805, sect. 2. Held, the possession in Massachusetts of ten counterfeit bank-bills of the Nantucket bank, with intent to pass them in another State, (Connecticut) is an offence within this act of March 15, 1805.

1 Ld. Raym.  
737, Rex v.  
Goate.

§ 16. An indictment lies for forgery at common law, though no person be prejudiced by it; with intent to defraud, (the person) must always be alleged and proved. East's C. L. 968, Rex v. Harrison.

1 Salk. 342,  
Queen v.  
Smith.

§ 17. This was an indictment for forging a deed with the mark of J. S.; held, the mark need not be stated, though objected that without stating the mark there was no forgery.

2 W. Bl. 400,  
Rex v. Birch  
& al.

§ 18. The defts. were indicted for that they feloniously, did falsely make, forge, and counterfeit, and did cause and procure to be falsely made, forged, and counterfeited, a certain paper writing purporting to be the last will &c. of A, deceased. Objected the indictment should have been for forging &c., the last will &c., and not a paper writing &c.; but the court held, the indictment well formed.

1 Salk. 342,  
Rex v.  
Stocker.—  
Same case,  
371.

§ 19. The deft. was indicted, for that he *fabricavit seu fabricari causavit* a bill of lading. Held ill on demurrer; for the indictment ought to be positive and certain; here it is in the disjunctive, and bad, though forging or causing to be forged is forgery.

2 W. Bl. 787,  
Rex v. Powel.—  
East's C. L.  
976, 969.

§ 20. Powel was indicted and convicted for falsely making, forging, and counterfeiting a certain receipt for money as follows, that is to say, received &c. with intent to defraud one Joseph Sikes against the form of the statute &c. Held well, and it is only necessary to aver a general intent to defraud one without stating the manner in which that fraud was to be effected; the intention is made out in evidence at the trial. By all the judges. Setting out the note &c. as follows, well.

§ 21. The deft. was indicted for forging a bill of exchange or bank-bill. Held, it was not necessary to insert the marks, letters, or figures, used in the margin of the bill for ornament, or the more easy detection of forgeries, as the same marks &c. form even no part of the bill.

CH. 213.  
Art. 6.

3 Johns. Cas.  
299, The  
People v.  
Franklin.

§ 22. So in this case the deft. was indicted for forging a check drawn in the name of a copartnership. Held, the indictment need not state the names of all the partners in the company. The forged writing must be laid and proved *verbatim*. East's C. L. 976. And it must be pursued exactly in words and figures. Id.; and 977. But a mere literal variance will not vitiate, as *received* for *receiv'd*, 977, 978; same word.

1 Johns. R.  
320, The  
People v.  
Curling.

§ 23. On the whole, forgery, or to forge and counterfeit, is falsely to make or alter any writing to the prejudice of another, either by making it falsely *de novo*, or falsely adding to or taking from, or altering words or figures in one. Possibly to do this in some particular cases it may be forgery, though not to the prejudice of another, though this is hardly conceivable; because where no one has any prejudice by the act, no wrong, no injustice done him by it directly or indirectly, but right and justice is done by the act, it is difficult to see how there can be falsity in the case, as where by mere mistake or accident, words are written wrong, and instantly the alteration is to make them right and as they should be.

## CHAPTER CCXIV.

### LARCENY, ROBBERY, &c.

#### ART. 1. General principles.

§ 1 *What is larceny or theft.* This crime is well described in the indictment, which charges that the deft. did feloniously take, steal, and carry away one piece of cloth &c. of the goods and chattels of C. D. to his damage &c. Larceny is *simple*, this is the felonious taking and carrying away another's personal goods. Or it is *mixed or compound*; this has all the properties of simple larceny, but is also accompanied with taking from one's house, shop, or person. 1. To constitute larceny, there must be an actual taking, or severance of the

4 Bl. Com.  
230.—French  
Penal Code,  
art. 379 to  
401 —2  
East's C. L.  
554.—Also 1  
Hale's P. C.  
504, 505.—  
East's C. L.  
554 to 791.

## CH. 214.

## Art. 1.

Forms of indictments  
&c. Cro. C.  
C. 450 to  
461.—4  
Wentw. 41  
to 44.

thing stolen, from the possession of the owner ; for as every larceny includes a trespass, if the party be not guilty of a trespass, in taking the goods, he cannot be guilty of a felony in carrying them away, Therefore, if the party lawfully obtain possession of the goods, as on a trust for, or on account of the owner, thereby acquiring a special property in them, he cannot afterwards be guilty of felony in converting them to his own use ; except by some new distinct act of taking, as by severing a part of the goods from the rest, with intent to convert them to his own use, whereby he determines the privacy of the bailment, and puts an end to the special property by it conferred on him ; in which case he is as much guilty of a trespass against the owner's virtual possession by this second or after taking, as if the act be done by a mere stranger.

4 Bl. Com.  
230, 231.—  
1 Hale's P. C.  
504, 506.—  
East's C. L.  
555 &c.

§ 2. Hence no delivery of the goods by the owner to the offender, upon trust, can ground a larceny. As if A lend B a horse, and he ride away with him ; or if A send goods by B, a carrier, and he carries them away ; these acts are no larcenies. But if a carrier open a bale of goods and take out a part, or carry them to the place appointed, and *afterwards* take away the whole, these acts are larcenies ;—for here, by the opening the bale, or this after taking, the *animus furandi*, or *lucri causa*, is obvious, and after delivery the trust is ended. But a felonious intent is not to be presumed from a bare non-delivery. By the common law, if a servant carry away the goods committed to him to keep, it is only a breach of trust, and not larceny. But if he have only the care and over-sight of the goods, as a butler of plate, or a shepherd of the sheep &c. the embezzling of them is felony. And if A deliver and intrust his own goods to B, and then take them away, with intent to charge B the value, A is guilty of felony. So if a guest in an inn takes away the plate he eats on.

East's C. L.  
554.—4 Bl.  
Com. 234,  
235.—Also 1  
Hale's P. C.  
510, 511.—  
East's C. L.  
c. 16, s. 41,  
42, 43, 44, 45,  
46.—Indict-  
ment for  
picking pocket-  
s, 3 Burn,  
83.

§ 3. The thing taken must be of value, and in which a man has property, to make larceny, at least at common law ; therefore theft at common law cannot be of *treasure trove*, or *wreck*, *waifs*, *strays*, &c. ; for till seized, the property is in no one ;—nor of beasts that are *feræ naturæ*, and not reclaimed. A deer, hares, conies in a forest &c., and fish in an open river, or wild fowl at their natural liberty, are not subjects of larceny ; but if they are reclaimed and the party knows it, or confined, and may serve as food, it is otherwise, even at common law ;—for if fish, for instance, are inclosed in a trunk so as that they may be taken at pleasure, a larceny of them may be committed. But there are some animals of so base a nature, that though reclaimable, no larceny can be committed of them ; such as bears, foxes, monkeys, rats,

2 East's C.  
L. 614.

ferrets, &c. But domestic animals or creatures, as oxen, horses, sheep, &c. those also fit for food, as hens, ducks, geese, turkeys, &c. and also their eggs, are the subjects of larceny. So *choses in action*, at common law, were not objects of theft. CR. 214.  
Art. 1.

§ 4. *The property must be personal, and the goods of another.* For if the things taken are real, or savour of the realty, larceny at common law cannot be committed of them; as at common law it is merely a trespass, and not a felony, to take such things. Hence no larceny can be committed of corn standing, grass, trees, hedges, stones, or lead of a house, &c.; but if once severed from the freehold by the owner, or even by the thief himself, and there is a space of time between the severance and the taking away, so as not to be all one continued act, it then may be felony to take them away. Thus of wood cut, grass in cocks, stones dug out of a quarry, larceny may be committed, if the interval be but an hour;—but special property and possession is sufficient. 4 Bl. Com.  
232, 233.—1  
Hale's P. C.  
510.  
4 Bl. Com.  
232.—2  
East's C. L.  
587.—Also  
1 Hale's P.  
C 510.—Also  
Co. P. C.  
109.—Cro.  
El. 490,  
Long's case.  
Brown's  
case, art. 4,  
and art. 5.

§ 5. Also to larceny, carrying away is essential. But it is carrying away, if the goods be barely removed from the place where they were found; as where one intending to steal plate, took it out of a chest and laid it on the floor, and was surprised before he got away with it. To this head may be referred some modern cases. 1 Haw. P. C.  
93.—4 Bl.  
Com. 232.—  
2 East's C.  
L. 555.—  
1 Hale's P.  
C. 508.

§ 6. Christian says, now it is fully settled “that in all cases where horses or carriages are hired, and are never returned, if the jury are of opinion from the circumstances, that the persons to whom they are delivered intended at the time of hiring never to return them, or that the intention to steal them or convert them to their own use, existed in their minds at the time they gained possession, they are guilty of felony.” Cites Leach, 189 and 327. So when one hires a horse for a particular time, or to go a particular journey, and after complying with the terms of the special agreement, sells it, he is guilty of felony, as his possession then is not supported by the consent of the owner, or any privity of contract. “And it is now generally held, that if the possession of the property is obtained by any contrivance, *animo furandi*, as by pretending to find a valuable ring, cutting cards, or laying wagers, or by undertaking to exchange a note into cash, or gold into silver, it amounts to a felony.” Cites Leach, 206, 226, 239; East's C. L. 556 &c. 4 Bl. Com.  
Chris. Notes,  
23, 24, 25 —  
East's C. L.  
c. 16, s. 92.  
Pear's case,  
and cases  
below.  
Cases of  
Patch, Hor-  
ner, &c.

§ 7. And Christian also says, it has been decided that if a parcel is left by accident in a hackney coach, and the coachman, instead of restoring it to the owner, opens it, and embezzles part of its contents, he is guilty of felony. Cites Leach, 320. Wynne's  
case.



CH. 214.

Art. 2.

1 Hale's P.  
C. 508.1 Hale's P.  
C. 509.—4  
Bl. Com. 232,  
233.2 East's C.  
L. 655, 656.Act of Con-  
gress, April  
30, 1789.

§ 8. In all these cases there is a carrying away of the goods, in violation of the agreement with the owner or of his trust, because the thief takes them away to his own use; whereas, by such agreement or trust, he is to return them to the owner. A takes B's horse in his close, *animo furandi*, but before A gets out of it he is seized, this is larceny.

§ 9. A felonious intention is essential. This is very material in making the act larceny; that is, the carrying away must be done *animo furandi*. As where a man takes his neighbour's plough, left in his field, and uses it on his own land, and then returns it; this is not felony, but only a trespass; for his returning it, shews he did not mean to convert it to his own use. So in many cases in the next preceding head, the intent was essential, and the acts were adjudged to be larcenies from the intention found to have existed in doing them. And in order to make the taking felony, the intent to steal must be "at the time when the party first gets possession of the goods; such a possession at least as is distinct from that of the owner; for a fraudulent intent, originating *afterwards*, to convert the goods to his own use, is not felony; but the original felonious intent may be collected from subsequent acts." But this general principle laid down by East, is true and without exception, only when it is taken in connexion with an after or second taking, mentioned under the first head above. For instance, a carrier honestly receives my goods to carry them to A, and carries them, and there leaves them, and his trust ends;—afterwards he takes them and carries them away, and converts them to his own use; now, to reconcile all the cases, his felonious intent must relate to this second taking, and not to his first receiving the goods.

ART. 2. *Acts of Congress as to larceny.*

§ 1. Sect. 16 of this act provides, "that if any person within any of the places under the sole and exclusive jurisdiction of the United States, or upon the high seas, shall take and carry away, with intent to steal or purloin the personal goods of another," he, his counsellors, aiders, and abettors, (knowing of and privy to the offence,) shall, on conviction, "be fined not exceeding the fourfold value of the property so stolen, embezzled, or purloined," half to the owner of the goods, and half to the informer and prosecutor, and be publicly whipped not exceeding thirty-nine stripes. (See the rest of this sect. head, Public Stores.)—[not said *feloniously* steal &c., but &c. as above.]

§ 2. Sect. 17 enacts, "that if any person or persons within any part of the jurisdiction of the United States as aforesaid, shall receive, or buy any goods or chattels, that shall be feloniously taken or stolen from any other person, knowing the

same to be stolen, or shall receive, harbour, or conceal any felons or thieves, knowing them to be so, he or they being of either of the said offences legally convicted, shall be liable to the like punishments as in the case of larceny before prescribed." (No mention in these acts of the value of the goods stolen.)

CH. 214.

Art. 2.

§ 3. The 4th sect. of this act enacts, "if any citizen or other person shall go into any town, settlement, or territory, belonging or secured by treaty with the United States, to any nation or tribe of Indians, and shall there commit robbery, larceny, trespass, or any other crime, against the person or property of any friendly Indian or Indians, which would be punishable if committed within the jurisdiction of any State against a citizen of the United States; or unauthorized by law, and with hostile intention, shall be found on any Indian land, such offender" forfeits not above \$100, and imprisonment not above twelve months; and when property is taken or destroyed, forfeits to the Indian, the owner of it, twice the value of it; and what the offender is unable to pay, is to be paid out of the treasury of the United States,—provided neither the Indian or his nation seek private revenge, or attempt satisfaction by force.

Act of Congress, March 30, 1802.

§ 4. Sect. 14 enacts, "if any Indian or Indians belonging to any tribe in amity with the United States, shall come over or across the said boundary line, (between them and the white people,) into any State or Territory inhabited by citizens of the United States, and there take, steal, or destroy any horse, horses, or other property belonging to any citizen or inhabitant of the United States, or of either of the territorial districts of the United States, or shall commit any murder, violence, or outrage, upon any such citizen or inhabitant,"—such citizen or inhabitant must apply to the agent of the United States, who, on having proper document and instructions, must apply to the nation or tribe of the offender for satisfaction; and if this be denied a year, then to make return of his doings to the President, and all papers &c., that proper steps may be taken; and in the meantime, the United States guarantee indemnity to the citizen &c. injured, who shall not seek private satisfaction &c.

§ 5. By art. 26, for the government of the navy of the United States, it is provided, "any theft not exceeding \$20, may be punished at the discretion of the captain, and above that sum as a court-martial shall direct.

Act of Congress, April 23, 1800.

§ 6. Very few decisions have ever been made upon these acts of Congress; but it will be observed, they do not define larceny. Sect. 16, act, April 30, 1789, speaks of *taking, with intent to steal, the personal goods of another*. And sect. 17

CH. 214. considers this stealing felonious. Both punish accessaries, though not expressly by that name. In practice on these statutes it is clear we must resort to the definitions of the common law to ascertain what is a taking; what is an intent to steal; what is a felonious taking; what are personal goods, and what are those of another; and it is best to leave these definitions and the construction of the different parts of these acts to judicial decisions, as cases may arise and be judicially examined. No doubt questions very interesting will arise, as in Clary's case, Ch. 206, a. 7, as to what places and crimes are, or are not within the exclusive jurisdiction of the United States, as well as in regard to what is larceny &c.

2 Johns. R.  
477, The  
People v.  
Gardner.

§ 7. Theft committed in one State cannot be tried in another, though the goods stolen be carried from the former into the latter by the thief, as in the case of the horse &c., Ch. 104, a. 10, s. 11, for the court in New York thought the offence in such case does not accompany the possession of the thing stolen, as it does in a case where a thing is stolen in one county and the thief is found with the property in another county. The court in New York cited 2 East's C. L. 774, which respects the common doctrine as to counties, but has no relation to different States. Supreme Judicial Court of Massachusetts does not allow this distinction; see Andrews' case, 2 Mass. R. 14, 31. This case was much considered; the one in New York but very little,—no arguments of the counsel or of the court appear.

ART. 3. *Massachusetts statutes as to larceny.*

§ 1. As this State ever has had statutes of her own to punish larceny, receiving stolen goods, and the like, every idea is excluded of the adoption of British statutes on this subject, though we have always adopted the principles and explanations of the common law in regard to it, as far as consistent with our own constitutions and statutes. Our statutes have been often revised and enlarged on this subject, and to have correct ideas of them it may be best to state, in substance, the last revising and now existing acts, and very briefly trace them back to their origin.

Mass. Act,  
March 16,  
1805.  
Punishment  
for larceny,  
Maine Act,  
ch. 7.—  
Kentucky  
Act of Dec.  
19, 1801, s.  
14, 15, 16,  
17, stealing;  
s. 18, receiving stolen goods; punishment, penitentiary, and value of the things stolen. Third

§ 2. Sect. 1 of this act enacts, "that any person who shall feloniously steal, take, and carry away of the property of another, any money, goods, or chattels, or any bond, or promissory note, bill of exchange, or other bill, order, or certificate, or any book of accounts for or respecting any money or goods due, or becoming due and payable, or to be delivered, or any deed or writing containing a conveyance of lands, or other real estate, or any other valuable contract remaining in force, s. 18, receiving stolen goods; punishment, penitentiary, and value of the things stolen. Third offence, in stealing a hog, sheep, or pig, is felony. Virg. Body of Laws, p. 265.

or any receipt, release, or defeasance, or any writ, process, or public record, shall be deemed guilty of the crime of larceny; and every such offender, and any person present aiding and abetting in any such larceny, or accessory thereto before the fact, by counselling, hiring, or otherwise procuring the same to be done, who before any court having jurisdiction thereof, shall be duly convicted of either of the felonies or offences aforesaid, shall be punished, when the money, goods, or other article or articles stolen, shall not exceed in amount or value the sum of one hundred dollars, by solitary imprisonment for a term not exceeding six months, and by confinement afterwards to hard labour for a term not exceeding one year, or by fine not exceeding one hundred dollars, and imprisonment in the common gaol for a term not exceeding one year; and when the money, goods, or other article or articles stolen, shall exceed in amount or value the sum of one hundred dollars, then by solitary imprisonment for a term not exceeding one year, and by confinement afterwards to hard labour for a term not exceeding three years, to be ordered by the court before whom the conviction may be, according to the degree and aggravation of the offence."

CH. 214.  
Art. 3.

§ 3. Sect. 2 provides, the Supreme Judicial Court shall have exclusive jurisdiction of all larcenies, where the property stolen shall be alleged to exceed \$100 in value, and concurrent jurisdiction with the Common Pleas and Municipal Court in Boston where under \$100 in value. And each justice of the peace has jurisdiction where the same does not exceed in value \$5; and any one convicted in the Common Pleas or Boston Municipal Court of any larceny, as principal or accessory, before or after the fact, may be punished by fine not above \$100, and imprisonment in the common gaol not above a year, one or both. And any person convicted before a justice of the peace of any larceny, as principal or accessory, before or after the fact, may be punished by fine not exceeding \$5, and imprisonment in the common gaol not above twenty days, one or both.

Jurisdictions  
of several  
courts.

§ 4. Sect. 3, punishes a "person having been before convicted of the crime of larceny, or as accessory thereto before the fact," who afterwards shall commit, or be a like accessory to another larceny, and duly convicted thereof in the Supreme Judicial Court; or any person convicted before that court at one and the same term thereof, as principal or as accessory before the fact, in three distinct larcenies, as a common and notorious thief, by solitary imprisonment not above a year, and hard labour not less than three or above fifteen years.

Two or more  
larcenies.

§ 5. Sect. 4 enacts, "that if any person in the night-time shall break and enter any shop, warehouse, or office, not ad-

Larceny in  
the night in a  
shop &c.,  
vessel &c.

CH. 214. joining to or occupied with a dwelling-house, or any ship or vessel lying within the body of the county, and shall there  
*Art. 3.* commit a larceny," such offender, aiders, &c. accessories before the fact, shall be punished by solitary imprisonment not above a year, and hard labour not above fifteen years.

Entering a dwelling-house in the night without breaking &c.

§ 6. Sect. 5 enacts, "that if any person in the night-time shall enter without breaking, or in the day-time shall break and enter any dwelling-house, or out-houses thereto adjoining or occupied therewith, or any office, shop, warehouse, ship or vessel, as aforesaid, the owner or other person being therein and put in fear," such offender, aiders, &c. and accessories, before the fact, shall be punished by solitary imprisonment not above a year, and hard labour not above ten years.

Larceny in the day time in a house &c.

§ 7. Sect. 6 enacts, "that if any person in the day-time shall commit any larceny, in any dwelling-house, office, shop, warehouse, ship, or vessel, as aforesaid, or in the night-time shall break and enter any church, meeting-house, court-house, town-house, college, or academy, or other building erected for public uses, or any mill, malt-house, store, barn, or stable, and shall commit any larceny therein," or be aiding &c. or accessory before the fact, he shall be punished by solitary imprisonment not above six months, and hard labour not above five years.

Assault and robbery.

§ 8. Sect. 7 enacts, "that any person who shall, by force and violence, or by other assault, and putting in fear, feloniously steal, rob, and take from the person of another any money, goods, bank-note, bill of exchange, or other negotiable bill, note, or order, due or in force, or any other property which may be the subject of larceny, shall be adjudged guilty of the crime of robbery; and every such offender, and any person present, aiding and abetting in the commission of such felony, or accessory thereto before the fact, by consulting, hiring, or procuring the same to be done, who in the Supreme Judicial Court shall be duly convicted of either of the felonies or offences aforesaid, shall be punished by solitary imprisonment for such term, not exceeding two years, and by confinement afterwards to hard labour for life."

Other larcenies.

§ 9. Sect. 8 enacts, "that if any person shall commit any other larceny from the person of another, either by openly and violently, or privily and fraudulently, every such offender," his aiders &c. or accessory before the fact, shall be punished by solitary imprisonment, not above a year, and hard labour not above five years.

Assault with intent to steal.

§ 10. Sect. 9 enacts, "that if any person with a dangerous weapon, or other actual violence, and with intent to rob or steal, in manner aforesaid, shall assault another, every such

offender," his aiders, and accessaries before the fact, shall be deemed felonious assaulters, and punished as aforesaid &c. CH. 214.  
Art. 3.

§ 11. Sect. 10 enacts, "that if any person shall knowingly harbour, conceal, or maintain any principal felon, or accessory before the fact, in any robbery or larceny committed in any manner aforesaid, or shall receive, or shall aid in concealing, any money, goods, or other articles stolen as aforesaid, knowing the same to have been so stolen in any such manner as aforesaid, every such offender upon due conviction of either of the offences aforesaid, shall be deemed an accessory after the fact to the same robbery or larceny;" punishable by solitary imprisonment not above six months, by hard labour not above three years, or by fine not above \$500, and imprisonment in the common gaol not above three years, or either of them. Concealing a felon or receiving stolen goods.

§ 12. Section 11 enacts, and any such receiver of stolen goods may be prosecuted therefor, for a misdemeanor, though the principal felon may not have been prosecuted or convicted; and the punishment is as of an accessory after the fact. How one is prosecuted for receiving stolen goods.

§ 13. Section 19 provides, if one be convicted of receiving stolen goods, and afterwards knowingly receive stolen goods, or aid in concealing them; or if one in the same term of the Supreme Judicial Court be convicted in three distinct acts of receiving or concealing stolen goods, he shall be deemed a common receiver of stolen goods, and be punished by solitary imprisonment not above a year, and by hard labour not less than three nor above ten years. Receiving stolen goods more than once.

§ 14. Section 13 enacts, "that when any person convicted for the first offence as a receiver of stolen goods, or as accessory after the fact, in any simple larceny, and not adjudged to be a common receiver of stolen goods, shall make satisfaction to the party injured by such larceny, to the full amount of the money, goods, or articles, stolen and not restored," the court shall exempt such receiver or accessory from the penalty of confinement to hard labour. First conviction of receiving stolen goods.

§ 15. Section 14 makes provision for recompensing the prosecutor, after conviction. Court may make him a reasonable allowance, at their discretion, not exceeding his actual expenses, and a reasonable allowance for his time and trouble, to be paid out of the county treasury, to be reimbursed to it by the State. Prosecutor to be recompensed.

§ 16. Section 15; this section provides, whenever an officer arrests the person charged with larceny, as he is directed to do, he is to secure the goods alleged to be stolen, found in possession of the accused person, or waived by him or her, in flying from justice; and make an inventory of them, and annexed to the officer's return. Owner getting a conviction &c., has his goods restored immediately after conviction. Officer arresting the thief to secure the property alleged to be stolen.

CH. 214.

Art. 3.

Owner how  
indemnified  
&c.

Sect. 16 provides, when the convict is sentenced to hard labour, the person stolen from is to be indemnified out of his earnings ; and if committed to the common gaol, in execution, then to be ordered to pay such person the full amount stolen, and not restored or satisfied ; and if not able to make this satisfaction, then by service &c. ;—not to be held in gaol above thirty days &c. ; costs to be paid by service, in certain cases, &c. &c.

Mass. Act,  
Mar. 10, 1797.

*Larcenies at fires*, by the 4th section of this act, are punished as other larcenies are. And persons are deemed guilty of larceny, who, at fires, receive goods or take them, the property of others, and who do not return them or make them known in the manner specified.

§ 17. On examining the statutes, largely cited in this chapter, and which in practice will be the grounds of numerous prosecutions, it will be observed that those of them passed by Congress are entirely new, having their origin solely under the Constitution of the United States ; that though the statute of Massachusetts, passed in March, 1805, is generally a revision of the act passed in 1785, and of one passed March 9, 1785, to punish robbery, yet this act of 1805, contains some new provisions and distinctions ; that though the acts of 1785, are generally revisions of the Provincial acts on these subjects, passed 1692, 1711, 1716, 1736, and 1761, yet also these acts last passed contain provisions the former did not ; and though these Province acts are generally revisions of those of the Colony, yet these latter contained but a part of the provisions and distinctions of the former. This generally has been the case in the revisions of our laws. Every revision, almost of them, on any subject, has made them more voluminous. . Nor have any of our statutes made a distinction as to grand or petty larceny, or goods stolen, of a value over or under 12*d*. In the English books the nature of both is the same, and in them the difference is only as to the punishment.

In these statutes there will be observed several expressions, the subjects of numerous and important decisions in the English books, to which those decisions will usefully apply in the United States ; such as, "intent to steal ;" "the personal goods of another ;" "feloniously taken or stolen ;" "feloniously take and carry away ;" "night time ;" "dwelling-house," and out-buildings, parcel thereof ; "and put in fear ;" "force and violence ;" "and putting in fear ;" "from the person of another ;" receiving stolen goods. Though this long act is cited, and is all statute law, it may be usefully cited as including almost all the distinctions that can arise in cases of larceny, and as, in fact, a valuable abridgment of the common law cases as to houses and other buildings, and different vessels &c.,

and different kinds of property, the subject of theft, and the various situations of it when stolen; also receiving stolen goods, several grades of punishment, &c. CH. 214.  
Art. 4.

ART. 4. *American adjudged cases.*

§ 1. This was an indictment against the defts., for that they feloniously broke and entered the dwelling-house of J. Colby, and feloniously stole, among other things, thirty Spanish milled dollars, against the form of the statute &c. He was acquitted of all but the simple larceny. Judgment was arrested as to the money, because the value of it was not laid in the indictment; it was amended by consent. 1 Mass. R. 245, Commonwealth v. Smith & al.

§ 2. The indictment came up on an appeal, and the court was of opinion that the indictment for larceny, alleging that the deft. stole "a bank-note of the value of ———, of the goods and chattels of ———," is sufficient without a more particular description of the note. 1 Mass. R. 337, Commonwealth v. Richards.

§ 3. This was an indictment against Trimmer and wife, and Patience Whitney, for breaking &c. a "store with intent to steal, and stealing &c., on the statute." Held, the wife was not chargeable for a larceny jointly with her husband: 2. That removing a plank loose, and not fixed to the freehold, in a partition wall of a building, is not a *breaking* within the statute. *Nolle prosequi*, as to the wife. The indictment amended by consent. See East's C. L. 558, 559. 1 Mass. R. 476, Commonwealth v. Trimmer & al.

§ 4. In this case goods were stolen in New Hampshire and brought into Massachusetts. The court held, an indictment lay against a receiver of them here. And the receiver was sentenced to pay the treble value. See 1 Hal. P. C. 507, carrying into another county is as a new caption. 2 Mass. R. 14, Commonwealth v. Andrews.

§ 5. The deft. was indicted for receiving stolen goods, the property of A. To this indictment the deft. pleaded in bar a former indictment, conviction, and judgment, for receiving stolen goods, the property of B; and alleged, that the two parcels were received by him of the same person at the same time, and in the same package, and that the act of receiving them was one and the same. This plea was adjudged insufficient. The court never recommend a *nolle prosequi* to the government's counsel but at their instance. This decision seems to have been on the ground, that the receiving of goods stolen by one of *two* distinct persons makes two distinct offences, though the goods were stolen by one act, at one time; for being stolen from two persons, each having separate property, the thief is guilty of two crimes. As if the watch of A and the watch of B are both in one box, and C by one and the same act steals them both, he is guilty of two distinct crimes. 2 Mass. R. 409, Commonwealth v. Andrews.



CH. 214.

Art. 4.

3 Mass. R.  
126, Com-  
monwealth v.  
Andrews.

§ 6. The deft. was indicted as *accessary*; and the indictment stated the larceny of the principal, and that the deft. knowingly received his stolen goods, *feloniously*, from Tuttle, the thief, and aided &c. him in his felony. Judgment arrested, because it was not stated that Tuttle, the thief, had been convicted; and the jury found especially they had no evidence he was ever convicted; but found the deft. guilty of the charge in the indictment, if he could, by law, be convicted as *accessary* before the principal thief was convicted; and if not, then they acquitted the deft. The court said, by the common law, no *accessary* can be tried and convicted until after the principal is convicted or outlawed, and this proved to the jury; or unless the principal be charged in the same indictment with the *accessary*, and tried at the same time, when the jury first finds the principal guilty, then proceed against the *accessary*; the only exception is, when he requests first to be tried; and then, on conviction, there can be no judgment till the principal is found guilty: that our legislature had adopted the principle of 1 Anne, c. 9, s. 2, which provides, that when the principal could not be taken or prosecuted, the receiver of stolen goods might be prosecuted and punished for a misdemeanor; that the receiver must be prosecuted as *accessary*, unless the principal be not known or prosecuted. So are the forms, and here the deft. is indicted as *accessary*. No allegation the principal is not known or prosecuted, necessary to a prosecution of the receiver, as for a misdemeanor. A silent submission, by the deft., to a trial, was not a waiver of his right.

4 Mass. R.  
560, Com-  
monwealth v.  
Brown, see  
a. 5.

§ 7. The deft. was indicted of larceny, in stealing two pieces of cloth, alleged to be the property of one Willis. And the point decided was, if one to whom a waggon load of goods, consisting of several packages, is delivered to be transported from one place to another, fraudulently taking away one of the packages, such taking is felony, though the whole package is taken without breaking it. And Parsons C. J. said, "all the goods in the waggon were delivered to him (deft.) as one mass or body, and his taking away one of the packages was a separating a part from the whole, and thus was determined the supposed privity of contract; for the contract with him was not to carry the several packages of which the load was composed, but to carry the load to Sudbury in the state in which it was delivered to him." [He was a man hired on the road by Willis, the waggoner, to drive the team.] Thus far Brown was viewed as a common carrier. But the Chief Justice said he was not one, but a man servant to Willis, the carrier, to drive his team, and so inferred Brown had no special property in the goods &c.

§ 8. This was an indictment for a robbery. It was alleged in it that the deft. with force and arms, in the public highway, feloniously assaulted one Peter Tracy, and one silver watch and watch-key of his goods &c. from the person and against the will of the said Peter, in the highway aforesaid, by force and violence, did steal, rob, take, and carry away, against the form of the statute, omitting the usual words &c. *putting in fear*. Held, this was robbery, and well enough described; was according to statute of March 16, 1806, s. 7, (c. 142,) for though these words, *putting in fear*, are in this section, they do not apply to a case of actual violence.

CH. 214.  
Art. 5.

7 Mass. R.  
242, Com-  
monwealth v.  
Humphries.

§ 9. Held, the party from whom goods have been stolen is a competent witness, on the trial of the offender, as to any facts within his knowledge. See 1 Phil. Evid. 92 &c.

9 Mass. R. 30,  
Common-  
wealth v.  
Moulton.

§ 10. In this case the deft., indicted for a larceny, stood mute on his arraignment. The court impannelled a jury, who returned their verdict that he stood mute, fraudulently, wilfully, and obstinately. He was sentenced as on a conviction. Like inquiry, 13 Mass. R. 299; party remanded to prison;—case, murder.

9 Mass. R.  
402, Com-  
monwealth v.  
Moore.

§ 11. Not larceny nor any criminal offence &c. to take away from another person a letter of no intrinsic value, nor importing any property in possession, in the person from whom taken.

6 Johns. R.  
103, Payne v.  
The People.

§ 12. The deft. was indicted for highway robbery; plea, not guilty. Upon the trial the jury could not agree, and said it was probable they should not agree on a verdict; a juror was withdrawn from the pannel without the deft's. consent, and the jury was discharged of the prisoner, and he was remanded to prison. Afterwards, in the same term, he was tried and convicted by another jury; and the conviction was holden to be good.

9 Mass. R.  
404, Com-  
monwealth v.  
Bowden.

§ 13. In this case Rowell was convicted of larceny in the sessions, and claimed an appeal; but not having sureties, judgment was given against him. By an act of the legislature, his appeal was allowed. His attorney entered his appeal;—he did not appear, but because imprisoned in New Hampshire he was not defaulted by consent of the State's attorney; but was defaulted on his recognisance, and *scire facias* stayed to June term; but altered, and his appearance entered by his attorney by such consent, and continued.

Essex, Nov.  
Term, 1796,  
Common-  
wealth v.  
Rowell.

Getting possession of goods *lucri causa*, by art and contrivance or conspiracy, is felony and larceny. Ch. 200, a. 1. s. 13.

ART. 5. Several English cases as to what is larceny or not at common law.

§ 1. It will be observed this is a very material inquiry, as

## CH. 214.

## Art. 5.



Loft, 601.

our statutes do not define it. And sect. 8, Mass. act provides, if any person shall commit any other larceny &c. leaving larceny to be ascertained by the rules of the common law, mainly, as most cases on these statutes are.

§ 2. In this case goods were sold and earnest paid, but not removed. Held, if a person take out some of them before actual delivery to the buyer, or to any to convey to him, this is larceny; because after the sale is completed and earnest paid, the possession of the seller is that of the buyer.

Leach, 264,  
Lapier's case.  
East's C. L.  
557.—Leach,  
204.—4 Bl.  
Com. Chris.  
Notes, 23.—  
1 Hale, 508.  
—Leach, 266,  
Farrel's  
case.—East's  
C. L. 557.

§ 3. The removal of a parcel of goods from one end of the waggon to the other, with an intent to steal, amounts to a larceny. But where a bale of goods was raised, and placed its end in a perpendicular posture, this was thought not to be a sufficient carrying away, there not being a complete removal from the space it before occupied. And where a man was stopped, and ordered by the prisoner to put down upon the ground a parcel, which he was carrying away, but which the prisoner did not afterwards take up, this was held not a sufficient asportation to complete the crime.

Chris. Notes,  
4 Bl. Com  
23.—East's  
C. L. c. 16,  
a: 14, 15.

§ 4. Now in every case the judges determine that the property of the master delivered by him into the custody of the servant, still remains in the possession of the master, and if it is embezzled by the servant, or converted to his use, he is guilty of felony. See Brown's case.

1 Hale's P.  
C. 506. Cites  
Co. P. C.  
105.—East's  
C. L. c. 16,  
a. 16, 17.

§ 5. But if a man deliver a bond to his servant to receive the monies due on it, or delivers him goods to sell, and he accordingly sells, and receives the money, and carries it away *animo furandi*, this is not felony or larceny. So if he receives his master's rents, for he has not the money by his delivery, nor was it ever in his possession.

1 Hale's P.  
C. 506, 506;  
cites 13 E.  
IV. 9.

§ 6. But if A deliver the key of his chamber to B, who unlocks it, and *animo furandi*, takes A's goods, this is felony and larceny, for he takes them, and they are not delivered to him. And so if one takes a piece of plate set before him to drink out of in a tavern &c., this is felony; for he has only liberty to use it, not a possession by delivery. So of an apprentice who feloniously embezzles his master's goods or money out of his shop; for he has no such possession or any special property; his possession is merely that of his master.

Cites Dalt.  
c. 102.

§ 7. If A take B's goods, and is excused felony, because *he finds* them, he must really believe he finds them, and in fact they must be found; and the finding must not be a pretence for stealing; hence if A takes a waif or stray, he must really think it such; and if A finds B's goods or horse where usually placed, and takes either, *animo furandi*, it is felony, and the pretence of finding is no excuse. But if my horse

1 Hale's P. C.  
506.

stray into A's ground, and he takes him *bonâ fide damage feasant*, though without right, this is not felony or larceny. It is no *felleo animo*. He merely asserts a right, though mistaken; he has no intention to make the horse his. So if A's sheep stray into B's flock, and he by mistake shears it, this is not larceny, but is evidence of it, if he marks this sheep with his mark, or hides it.

CH. 214.  
Art. 5.

§ 8. If A steal B's horse, and afterwards delivers it to C, no party to A's theft, and C rides him away, *animo furandi*, he is no felon to B, because A stole him from B, and not stolen by C, for C *non cepit*; neither is C a felon to A, for he delivered the horse to C;—but otherwise, if C steal the horse from A. In this case C is a felon to A and B both; for by A's theft, B lost not his property, nor in law possession.

1 Hale's P.  
C. 507.

§ 9. Must be *animo furandi*, as well as a *cepit et asportavit*, and another's personal goods; for, says Hale, "it is the mind that makes the taking of another's goods to be a felony, or a bare trespass only." But as the intention is secret, it must be judged by the circumstances of the fact. These are to be considered thus:—A thinks he has a title to B's horse, or a right to distrain him, and so seizes him; this is only a trespass, for here is a pretence of title. But it may be a trick to cover a felony; and "the ordinary discovery of a felonious intent is if the party doth it secretly, or being charged with the goods, denies it. But if A takes B's goods away openly before him or other persons, (not by apparent robbery,) this is evidence of trespass only. So it is if A have a horse in a common, and B's cattle there, and he takes A's horse to ride after them, and then leaves the horse in the common. See the case of the plough and horse hired and then sold, above.

1 Hale's P.  
C. 508, 509.  
—East's C.  
L. 554 &c.

§ 10. When may this *animo furandi* be presumed or not. Hale answers above, according to circumstances.

East has made some critical observations on this point. He lays it down, generally, that whenever the property of a man, taken from him without his knowledge or consent, is found upon another, it is incumbent on this other to prove how he came by it; otherwise the presumption is, that he obtained it feloniously. This, like every presumption, is strengthened, or weakened, or rebutted by concomitant circumstances, too numerous in the nature of things to be detailed. Some are the length of time from losing to finding the property, as it may furnish more or less doubt as to the identity of it; or as in the meantime it may have often changed hands; or as it may increase the difficulty to the prisoner of accounting how he came by it; in all which considerations, that of the nature of the property must generally be mingled,—so the probability he

2 East, 655,  
656, 657.

CH. 214. was near the place where the property was when taken away;—so his conduct at the time, and before, and after.

Art. 6.

But merely to find in one's possession property of the same kind which another lost, unless he can by marks or other circumstances satisfy the court and jury of its identity, is not generally sufficient evidence of the goods having been feloniously obtained; though where the fact is very recent, so as to afford reasonable presumption that the property could not have been acquired in any other manner, the court is warranted in concluding it is the same, unless the accused can prove the contrary. As where A is found coming out of B's barn, and upon search, corn is found upon him of the same kind with what was in the barn, this is pregnant evidence of guilt. So where sugar of a certain kind is stolen out of a vessel, and a man at work in or about her is found in possession of such sugar, of which he gives no satisfactory account, this affords presumptive evidence of his guilt. But Lord Hale says, he would never convict a person of stealing the goods of one unknown, merely because he would not give an account how he came by them; unless due proof be made that a felony had been committed of those goods. The fact of concealment is but corroborative proof of stealing them; and confession drawn from one is not proof generally; see art. 11.

1 Hale, 290.  
—East's C.  
L. 667.

ART. 6. *Special property.*

§ 1. Larceny may be of it, if he from whom the goods are taken, has only special property in them. That was Brown's case above, the goods were stated to be the goods of Willis the carrier. But if an officer attach goods, and bail them to A, on his receipt to restore them on demand, A has not such property. 14 Mass. R. 217, 219.

1 Hale's P.  
C. 513.

§ 2. So if A bails goods to B to keep for him, or to carry for him, and B is robbed of them, the felon may be indicted for larceny of the goods of A or B, and it is good either way, for the property is still in A, yet B hath the possession, and is chargeable to A if the goods be stolen, and has the property against all the world but A. But the goods cannot be the goods of a *feme covert*; and if one be indicted for stealing her goods, he must be acquitted, but then he may be indicted for stealing her husband's goods.

1 Hale's P.  
C. 513.—  
4 Com. D.  
448.—2 Ld.  
Raym. 890,  
Carter's case.

§ 3. So if A has a special property in goods, as by pledge or a lease for years, and they are stolen, they must be supposed in the indictment the goods of A. So if he has a special property as bailiff;—so cloth in a tailor's hands;—so if the owner be unknown. And generally the indictment must state to whom the property stolen belongs, and from whom taken.

§ 4. If one have special or limited property in goods and the possession, he cannot commit larceny as to them, for in this case he cannot feloniously take them, "and regularly a man cannot commit a felony of the goods in which he has a property." CH. 214.  
Art. 6.  
1 Hale P. C.  
513.

§ 5. Therefore, if a clothier deliver yarn to a weaver and he embezzles it or runs away with it, this is no larceny; for here the weaver has a special property and possession. So is the case of the carrier. So if plate be delivered to a goldsmith to be wrought, and he embezzles it or runs away with it, it is no felony or larceny, for the same reason. So if a woman hire a room furnished, and afterwards carries away the furniture, this is not larceny, for she during the lease has a special property in it, the use and wear of it, and also possession.

§ 6. So if A and B are joint-tenants, or tenants in common of a horse, and A takes him, possibly *animo furandi*, this is not larceny; because one tenant in common taking the whole does only what he may lawfully do, though his property is limited. See Trover &c. where such special property is stated in various cases. 1 Hale P. C.  
513.

§ 7. So if A takes B's cloth and makes it into a garment, B may take it with the trimmings A puts on it, and no larceny, nor even trespass. So if A take B's cloth and embroiders it with silk or gold, B may take the whole garment and embroidery, and no larceny or even trespass, for B acquires a right to the whole, though only the cloth was his. So if A takes the hay or corn of B and mingles it with his own heap &c., B may take the whole, for the same reason.

§ 8. *Restitution*. When there has been judgment of forfeiture of goods, and then judgment is reversed or the indictment is discharged for some defect, there is judgment of restitution of goods to the party indicted, and writ of restitution issues accordingly. But, says East, this writ is fallen into disuse; and on production of the goods at the trial, the court orders them to be restored to the owner, without any inquiry as to the fresh suit; and if not restored, he may have trover for them after conviction; and this notwithstanding there has been a sale in market overt. But restitution is only from the person in possession of the goods at the time, or after the felon's attainder; therefore, if a party purchase them *bond fide* in market overt, and sell them again before conviction, no action will lie against him for the value, though notice were given to him not to sell. At common law the owner may peaceably, in general, retake his goods stolen, when the property is not changed by some intermediate act, but not with intent to favour the thief. Cro. El. 490,  
Long's case.  
East's C. L.  
78 &c.

**CH. 214. ART. 7. Robbery—what is or not.****Art. 8.**

§ 1. See our present statute description of robbery, Massachusetts act, March 16, 1805, sect. 7, above. As to robbery by the United States laws, see Piracy &c.; Foster C. L. 128; 1 Hawk. 147; Mass. act. March 16, 1805.

Mass. Act,  
March 9,  
1785.—Maine  
Act, ch. 7.—  
Mass. Act,  
1818, ch. 124.

§ 2. This act enacted, "that every person who shall feloniously assault, rob, and take from the person of another any money, goods, chattels, or other property that may be the subject of theft," shall suffer death. No putting in fear was mentioned in this act.

Mass. Pro.  
law of 1761.

§ 3. This province statute contains the above words, and punishment without benefit of clergy, but confined the act to "any highway, street, passage, field, or open place." The Province act of 1711, confined the act to one travelling the common road or highway, and punished with branding, imprisonment, and threefold value. The Province act of 1692, confined the act to robbing any person in the field or highway. So was the Colony act of 1642, and punishment, whipping, &c. On the whole, our law has varied very much from time to time, as well as to description as to the punishment of this offence. This act of 1819 makes robbery death, if the assault be with a dangerous weapon with intent to kill or maim, or if so armed shall actually strike or wound &c.,—same, accessory before the fact.

Mass. Act,  
Feb. 19, 1819.

1 Hale, 532.  
—4 Com. D.  
444.—Indict-  
ments for  
robbery, 4  
Went. 51, 52.  
—Cro. C. C.  
682, &c.—  
4 Bl. Com.  
241, 242.

§ 4. According to Hale, "robbery is the felonious and violent taking of any money or goods from the person of another, putting him in fear," be the value above or under 1s. Robbery is mixed or compound larceny, and is taking feloniously another's goods but from his person with violence. Blackstone adopts Hale's definition;—*putting in fear*, there must be a taking, and the value is not material, and the taking must be by force or a previous putting in fear. And this previous putting in fear is the criterion that distinguishes robberies from other larcenies. But this is what may put a common person in fear; but it is not necessary in fact, actual fear be laid in the indictment or proved on the trial. It is sufficient if the offence be charged violently and against his will; it is enough if such circumstances appear on the evidence as are likely to induce a man to part with his property. And the person robbed may be knocked down before he even knows of the attack, so no actual fear.

Foster, 128;  
and Har-  
man's case, 1  
Hal. P. C.  
534.

**ART. 8. What is a felonious taking from the person.**

1 Hal. P. C.  
532, 533.

§ 1. As in larceny so in robbery, something must be feloniously taken, though there be an assault, yet if in fact nothing is taken it is only a misdemeanor. But there is a taking in law and a taking in fact. If thieves come to rob A and make him swear to bring them money, and he does, and they receive it, this is robbery, though he was not bound by such oath;

for the fear continued ; and this evidence will maintain a general indictment of robbery. So if A assaults B and bids him deliver his purse, and B does it, this is taking ; and so it is if B refuses, and then A prays him to give or lend him money, and B does so accordingly, this is robbery ; for B does it under the same fear. So if B throws his purse or cloak into a bush, and A takes it and carries it away. So if B flying from the thief lets fall his hat, and the thief takes it and carries it away, for all is the effect of the same fear.

CH. 214.  
Art. 8.

Robbery as burglary in Kentucky &c., only punished in the penitentiary, 1 to 5 years. T. K. Laws, 347, 364.

§ 2. So if A without drawing a weapon requires B to deliver his purse, and he delivers it, and A finding but 2s. in it, returns it to B, this taking is robbery. A has his purse tied to his girdle, B assaults him to rob him, and in the struggle the girdle breaks and purse falls to the ground, this is no robbery, because no taking ; but if B take up the purse, or if he had it in his hand and then the girdle break and purse falls, either is robbery ; here is a taking. Nor is it always necessary to robbery strictly to take from the person, but it is enough if in his presence. As where a carrier drives his pack-horses, and the thief takes his horse or cuts his pack, and takes away the goods. So if a thief come into A's presence, and with violence, and putting A in fear drives away his horse, cattle, or sheep ; this is robbery. If a robber by terror prevails with a person to deliver his money and the robber takes it, this is a violent taking.

1 Hal. P. C. 533.

4 Com. D. 444.

§ 3. So it is robbery to take money from one who puts himself in the way of the robber, if no concert between them. As where Norden was informed that a stage-coach was often robbed near the town by a single robber, and he resolved to take him. For this purpose he put a little money and a pistol in his pocket, and attended the coach in a post-chaise till the robber came up to the company in the coach, and to him, and presenting a weapon demanded their money. Norden gave him the little money he had about him, and then jumped out of the chaise with his pistol in his hand, and with the assistance of some took the highwayman. This adjudged a robbery. But otherwise had there been any previous concert between the person robbed and the robbers, then it may be a conspiracy in them all as in this case.

Norden's case, Foster, 128, 129.

Salmon's case.

If a man being assaulted to be robbed throws his money into a ditch, or drops his hat and the robber takes it, this is robbery in either case.

4 Com. D. 445.—3 Inst. 69.—H. P. C. 73.

§ 4. The deft. was indicted for that he feloniously made an assault on Samuel Cox in the king's highway, and put him in fear, and £9 in money from the person of Cox did take, steal, and carry away. And the court held, that a taking in the presence of the person robbed is a taking from his person,

2 Stra. 1015, 1019, Rex v. Francis & al.



Ch. 214.

Art. 9.

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4 Com. D.  
444.Crown C. C.  
684.1 Hale's P. C.  
583, 534.—4 Com. D.  
444.Pudsey's  
case.

and robbery; but in special verdicts it must be expressly found that the party robbed was present at the taking up of the money &c. by the robbers. Not enough sufficient evidence appears in the case to authorize the jury so to find. Court thought the offence larceny, and said there must be an indictment.

§ 5. On the whole, to constitute a taking in robbery the robber must take hold of the thing and remove it from the person, but this may be in the smallest degree. As where A laid hold of B's watch-chain, and by a jerk removed the watch from the fob, and B immediately caught it and kept it. And without putting in fear or violence, it is no robbery, but only larceny, but this putting in fear does not imply any great degree of terror.

ART. 9. *Who are robbers.* All aiding or in company to rob are principals, though only one takes the thing.

§ 1. So if one of the company robs out of the sight of the rest. As where one Pudsey and two others, A and B, assault C to rob him in the highway, but C escapes by flight, and as they were assaulting him, A rides from Pudsey and B, and assaults D and takes from him a dagger by robbery and came back to Pudsey and B. Held, Pudsey was guilty of robbery, though he did not assent to the robbery of D, and he was robbed out of the view of Pudsey and B, because they were all three assembled to commit a robbery, and this taking of the dagger from D was in the mean time. Cites Crompt. 34.

§ 2. And so if A, B, and C come to commit a robbery and A stands sentinel at the hedge corner to watch if any come, and B and C commit the robbery, though A was not actually present, nor within view, but at a distance from them, he is guilty of robbery. So as to burglary &c.

*Note.*—In France, Penal Code, art. 381, theft is punished with death in five cases: as where committed in the night: 2. By two or more persons: 3. The culprits or one of them being armed: 4. If in a dwelling-house &c. &c.: 5. If they employ violence or threaten to use arms. Theft in France seems to include robbery and burglary; thieves too, may be disfranchised and put under the inspection of the higher police.

ART. 10. *Indictment and evidence.*

§ 1. These, in *larceny* and *robbery*, will be very briefly attended to in this place; because much of the evidence as to these offences has already been considered, not only in the preceding articles in this chapter, but also in chapters 80 to 100, respecting evidence generally; also because in the nine preceding articles many matters in the forms of the indictment, in regard to these crimes, have been noticed, and more will be noticed in future chapters, in treating of indictments

generally. The essential words, in an indictment for larceny, CH. 214.  
have been stated art. 1, this chapter. And the essential words Art. 10.  
in an indictment for *robbery*, that is, compound or mixed larceny, are as follows, to wit:

Present &c., that A B, &c. at ———, on ———, with force and arms, *feloniously* did make an assault upon C D, of ———, &c. in the peace of God and of the Commonwealth, and him, the said C D, in *bodily fear* and danger of his life then and there did *feloniously put*; and one gold ring, of the value of ———, of the *goods and chattels* of the said C D, *from his person*, and *against the will* of the said C D, then and there *feloniously did take, steal, and carry away, against the peace, &c.*

This is an indictment on the principles of the common law, and the words in *italics* are essential. And in forming an indictment for larceny or robbery, on any statute, it must be varied as the descriptive parts of the offence are varied by the words of the statute. Hence in an indictment on our Provincial statute of 1761, which limited robbery to "any highway, street, passage, field, or open place," an indictment for a robbery in the highway, for instance, every material act done by the robber was stated to have been done, also, in the public highway. But, according to many authorities, the words as to *putting in fear*, are not absolutely essential in the indictment, provided it states the robber's acts were done by force and violence. *Commonwealth v. Humphries*, art. 4, and other cases above. Some of our statutes include these words, as that of 1805, and some not, as that of 1785, &c. And it may be a robbery, when from the person *by force*, or by *putting in fear*, according, not only to the statutes, but several decided cases, before stated. And therefore if actual force and violence be proved, it is not necessary to prove putting in fear. And it is clear, one's personal goods may be feloniously taken from his person by force and violence, robbery of one kind, and yet he not put in fear at all. As where he is so stunned as not to know any thing of the transaction; as where the robber came behind the person robbed, and knocked him down before this person even perceived the robber, and the robber took and carried away this person's money before he, in any degree, came to his senses.

Crown C. C.  
684, cites 4  
Bl. Com. 242.

It is conceived that all the other words in *italics* are essential in every indictment of robbery. That is, the act must be laid as done *feloniously*; *goods and chattels* must be taken; there must be a *taking and carrying away*; and *from the person*. If any doubt, it is as to the words *carrying away*. But according to several cases stated, there must be some removal of the thing taken, however small this removal

CH. 214. may be. And the words, *taking from the person*, clearly imply this removal. And when these words are used in the indictment, as invariably they must be, they may perhaps sufficiently express this carrying away. But as nothing is to be intended in criminal cases that may conveniently be expressed, it is always certainly best to insert the words, *and carry away*. And where *putting in fear* is not stated in the indictment, clear it is that *force and violence* must be. And if a statute make both *putting in fear*, and *force and violence*, parts of the crime, both undoubtedly must be expressed in the indictment; but no statute is recollected that absolutely requires both. Our act of 1805, makes *force and violence* necessary, or *assault and putting in fear*; the alternative is *force and violence, or other assault putting in fear*; and either will do. And as to the evidence, it is enough here to say, it must prove all the essential parts of the indictment, in the ways, and in regard to the particulars stated in the preceding parts of this chapter, and in the following articles. It is proper to state the kind of goods stolen in the indictment, that it may be seen the larceny &c. was of such goods as may be stolen, East's C. L. 777; but bills, bank-notes, &c. may be generally described, id.; so where goods, and the value, 778; in an indictment against the receiver of stolen goods, it is enough to state the time and place of his receiving them, not the time and place of stealing, id. 780.

Crown C. C.  
683.—M'Nally, 404 to 413.

§ 2. But as robbery consists in the original taking, if the robber take goods in one county, and carries them into another, he can be indicted only in the former. But otherwise in larceny; that is, in any county in which the thief has the goods.

Crown C. C.  
685, Baker's case; Mauley's case; Horner's case; Lapiere's case.

§ 3. But as to force, the mere snatching a bundle or umbrella from a man's hand, where no struggle is made, is not a force to constitute robbery; but it is to snatch a ring from a lady's ear, so that the ear is torn through thereby. In this case a sufficient degree of violence is proved, and a sufficient taking away, or *asportation*, is proved, though the ear-ring was found lodged among the curls of her hair, to constitute robbery.

In this, and in the preceding chapters, in this work, especially Ch. 197, and Ch. 200, I have noticed most of the essential principles and decisions on these subjects of larceny and robbery, found in the more ancient English books. And it now remains to examine several modern English cases lately published, that tend well to explain several important but obscure expressions in the old English books, which expressions we have adopted into our statutes, as before stated, a. 3, s. 17. Such as, "with intent to steal;" "the personal goods of an-

other ;" "felonious taking and carrying away ;" "night time ;" "dwelling-house," and out-buildings parcel thereof ; "putting in fear ;" "force and violence ;" "from the person of another." It is conceived that the English modern decisions, on these points, may be well resorted to in explaining these same expressions in our statutes. Though no doubt it is true, that in the scores of English statutes on the subjects of larceny and robbery, there are hundreds of expressions and nice distinctions, which here are useless, such as those which respect the benefit of clergy, different kinds of larceny and robbery, many different quantities of goods stolen or taken, and in various different places, and taken in ways, situations, and modes, varying almost infinitely.

ART. 11. *Evidence of felonious intent, or with intent to steal ; (see articles in the margin ;) felonious taking and carrying away the personal goods of another ; explained by late decisions.* CH 214.  
Art. 11. Comments ;  
see a. 1, s. 6  
to 9 ; a. 6, s.  
10, &c.

§ 1. Prisoners' confession they stole the goods. This must not be obtained by promises or threats ; if on either, it cannot be received. But by such often the owner finds where the goods are concealed, and thereby gets possession of them. Some think, in such cases, the confession ought to be received, corroborated by the fact of finding them in the place described by the prisoner. But East justly observes, that the most to be made of this is, that it is proper to leave to the jury on such confession, only the fact of the witness having been directed by him where to find the goods, and his having found them accordingly ; but not the acknowledgment of the prisoner's having stolen or put them there, which is to be collected or not from the circumstances of the case ; and this is now the more common practice. As to what is a threat or promise, it is enough, to exclude the confession, that it is said to the prisoner, it will be worse for him if he do not confess, or that it will be better for him to confess.

§ 2. Where the deft. takes the goods on a claim, or of right, or by mistake or accident, there is no felonious taking. But *aliter* if the claim be a mere cover of stealing. As where A intends to steal B's horse, impounded on a distress, replevies him by writ or plaint, and thus getting possession of the horse, runs away with him ; or meaning to steal B's goods in his house, gets possession by ejectment &c., on false testimony, and then sells or converts the goods in it, to his, A's, own use ; either is a felonious taking and carrying away.

§ 3. *Taking as a trespasser with fraud.* As where the prisoners entered A's stable in the night and took out two of his horses, and rode them thirty-two miles, and left them at an inn, and directing the inn-keeper to clean and

East's C. L.  
ch. 16 s. 98,  
94, Har-  
vey's case, A  
D. 1800.—1  
Leach, 420.

East's C. L.  
ch. 16, s. 98,  
A. D. 1801,  
case of Phil-  
lips & al.

CH. 214. feed them, saying they should return in three hours, and afterwards they were found walking on their journey. The jury found, they took the horses merely with an intent to ride, and afterwards to leave them, and not to return or make any further use of them. Held, a trespass only, and not larceny. Thus the case turns on the intention in the original taking, and this intention was proper for the consideration of the jury. And observed, there was no intention in the prisoners to change the property, and make it their own, but only to use it for a special purpose, as in the case of the plough, above stated.

A. D. 1786,  
1 Leach, 460,  
Wynne's  
case.—East's  
C. L. 664,  
665.

§ 4. *On a taking by finding.* Wynne was a hackney-coachman, and had taken up Mr. Wildon, the prosecutor, with several packages at A, and set him down in B, where the prisoner and a servant took all the things out of the coach, except a corded box, put under the seat, and containing several articles, for the stealing of which, and the box, Wynne was indicted; he being then discharged, drove off, soon after which the box was missed. In a few days he was traced and taken, and the box found, in consequence of a direction from him, at a Jew's, uncorded, and a part of the goods only in it; particularly several papers were missing, and among them two bonds, mentioned in the indictment. The jury were of opinion the prisoner uncorded the box and destroyed the papers, with intent to embezzle the goods found in it, and found him guilty. Held, the conviction was right. On the other hand, evidence to shew the finder endeavored to discover the true owner, and kept the goods till it might reasonably be supposed he could not be found; or that he made known his acquisition so as to make himself answerable, if called on by the owner, may prove no felonious taking.

A. D. 1801.  
East's C. L.  
ch. 16, s. 101.

§ 5. Taking goods by the owner's consent, delivery, or approbation, or on his behalf, is no felonious taking. Cases. The owner knowing the prisoners intended to steal certain goods of his, they having plotted with his servant to do so, directed him to carry on the business with a view to detect them. So he with his master's consent, agreed with the prisoners to open the outer door to them and let them into the house, where they broke open inner apartments and took the goods. A majority of the judges held it larceny, but not burglary. The judges thought there was no assent in the owner. His object being to detect them, he only gave them a greater facility to commit the larceny than otherwise they might have had. So only an apparent assent, and he never meant they should take away his property, and it was material the design to commit the larceny originated with the prisoners, and they resolved on it before he took any steps. Lawrence J. doubted if the goods were taken *invito domino*.

§ 6. Next material to inquire if the owner in delivering the property means to part with the property itself, or only the possession to the prisoner, if the property, by whatever fraudulent means he is led to give the credit to the prisoner, it cannot be felony. But if only the bare possession is delivered and the property retained, it is then necessary to inquire if the delivery be by way of charge, or as a general bailment, or for some special purpose. If I really intend to sell goods to A, and do sell and deliver them to him, though he gets them thus by deceiving me, and previously intending to cheat me, there is no felony; because, however fraudulent his intent may be, yet there is no trespass in taking the goods, without which there can be no larceny or robbery; and there is a statute remedy where such credit is obtained by false tokens or pretences. As where Harvey was indicted for stealing A's horse; they met at a fair where A had brought his horse to sell him; and the prisoner, being known to A, proposed to buy his horse. They walked together in the fair, and viewing the horse; A told the prisoner he should have him for £8, and ordered his servant to deliver him to the prisoner, who immediately mounted and rode off, telling A he would return immediately and pay him. A replied, *very well*. The prisoner never returned. Held no felony, as here was a complete contract of sale and delivery; A entirely parted with the property as well as the possession. But otherwise had A only lent his horse, and only delivered possession of him to the prisoner, retaining the property, and he when he received him meant to steal him.

CH. 214.  
Art. 11.

East's C. L.  
ch. 16, s. 102,  
103.

Rex v. Harvey.  
A. D.  
1787.

§ 7. The prisoner intending to defraud A ordered him to send him goods to be paid for on delivery, and gave the servant who brought them a bill in payment of no value. Held, no larceny, for the owner's servant parted with the property for such payment as was offered him, though the owner, his master, did not intend to give the prisoner credit. So several sharpers by false play, previously concerted among themselves, got A's money; held, no felonious taking, because A parted with his money under the idea it had been fairly won. So it is no felony to get silver under pretence of sending half guinea in exchange;—is money obtained on false pretence and a loan of the silver.

A. D. 1784.  
East's C. L.  
ch. 16, s. 103,  
Rex v. Parks  
& al.

Rex v. Coleman.

The prisoner was indicted for stealing two bank notes, the property of William Dunn. The prisoner sent one Dale (to whom he was unknown) with a letter directed to Dunn, bidding Dale tell Dunn he brought the letter from Mr. Broad, and to bring the money to him, the prisoner, in the next street, where he would wait for him. Dale carried it to Dunn, it was written in Broad's name, Dunn's friend, requesting the loan of £3 for a few days, and desiring the money might be enclosed

Ch. 16, s. 104,  
Atkinson's  
case, A. D.  
1799.

**CH. 214.** back in the letter immediately. Dunn sent it, being enclosed  
**Art 11.** in a letter directed to Broad and delivered it to Dale, who delivered it to the prisoner as he was first ordered. The letter turned out to be an imposition. Only a misdemeanor, because absolute dominion of the property was parted with by the owner, though induced thereto by means of a false and fraudulent pretence; and the owner of the property meant it should pass by his delivery—was with the case of false tokens.

**Wilkins' case.** But where the owner sent goods by his servant to be delivered to A, but B fraudulently procured the delivery to himself by pretending to be A; held to be felony. And Gould J. said, that the possession of personal chattels follows the right of property in them; that the possession of the servant was the possession of the master, which could not be divested by a tortious taking from the servant; that this rule held in all cases where servants had not an absolute dominion over the property, but were only entrusted with the care and custody of it for a particular purpose. This is consistent with Parks' case, above; for in that the servant had power to dispose of the goods to the prisoner, though not on credit, but for ready money, and the servant received ready money, though it afterwards proved to be of no value, and it was a sale and change of the property, though the price remained due. But where the bargain is incomplete and so the property is not transferred, and the proposed vendee fraudulently takes it and carries away, this is a felonious taking and carrying away; the verdict imported, he meant to steal it before he got possession. So if A, with intent to steal a bill of exchange from B, propose to buy, and get it into his hands, under pretence to inquire if a good one, and run off with it and convert it to his use before sold to him, this is a felonious taking and carrying away. The jury found the prisoner had a preconcerted design to get the bill into his possession with intent to steal it: 2. That the owner did not intend to part with it to the prisoner, without having the money paid first; as a proof of this, he sent his clerk to follow the prisoner when he went to shew the bill to a party to it, and to inquire if a good one. In both points it will observed the intention was considered a matter of fact proper for the jury's consideration. And this case is compared to Chisser's case, in which a tradesman put some cravats into the hands of A proposing to buy, for him to examine them, and being asked the price by A, named it, A offered less, and ran away with them without paying for them. Held, a taking and carrying away with intent to steal; his running away with them explained his intent precedent: 2. Though the goods were delivered, they were not out of the owner's possession by the delivery till the property was alter-

**East's C. L.**  
 ch. 16, s. 106,  
**Rex v. Sharp-**  
**less.**

**Rex v.**  
**Aickles.**

**Chisser's**  
**case.**

ed by the perfection of the contract, which was but inchoate. But if credit had been given him for the property for ever so short a time, no felony had been committed by converting it. See also the case of Patch and of Moore.

CH. 214.  
Art. 11.

§ 8. A pretending to find a valuable jewel, and offering to go halves with B, and on that pretence obtaining of B in her own house notes of £100 value, which were to be deposited in A's hands till the next day, as a security for the jewel to be left in B's custody then, and returned to A on his returning back the deposit and paying B £135, half of the supposed value of the jewel, which was a counterfeit. Adjudged a felony of the notes so received.

Watson's  
case, s. 107.  
A. D. 1794.

§ 9. *Different sorts of possession.* When clearly the property remains in the original owner, and the only question is, if he so far parted with the possession of the thing taken as to exclude the idea of any trespass in the taker, without which there can be no felony, we must inquire how the possession in fact was parted with, if by way of charge, general bailment, or for a special purpose: 1. If the legal possession remain exclusively in the owner, though there is a delivery by him in fact, larceny may be committed exactly the same as though no such delivery had been made: 2. If by the delivery a special property, and so a legal possession would be transferred apart from the felonious intent, then if found such delivery were fraudulently procured with felonious intent to convert the property so acquired, then also, the taking amounts to larceny, because such special property is attempted to be acquired with intent to steal: 3. If no evidence of a previous felonious intent to steal in so obtaining the property, but it is acquired on a privity of contract, still larceny may be committed after any act done to determine such privity of contract: 4. But if A legally acquired special property in goods, or in common, or by accession or confusion of goods, he cannot be guilty of larceny, though he convert the whole to his own use. See the fourth rule, illustrated by several cases, art. 6, s. 1 to 8, this chapter. First rule, above, A has the bare charge or custody of goods by delivery, then the legal possession remains in the owner, and A may commit larceny by a fraudulent conversion of them to his use. Cases a. 1, s. 2, a. 5, s. 4, 5, 6; East's C. L. ch. 16, s. 14, 109. Further, if a weaver deliver yarn to his journeymen to be wrought in his house, and they carry it away with intent to steal, it is felony; for the entire property remains there only in the owner, and their possession is his. But if the yarn be delivered to a weaver out of the house, and he having the lawful possession, that is, received by him with honest intentions, and he afterwards embezzle it, this is not felony; because

East's C. L.  
ch. 16, s. 109.



CH. 214. by the delivery he has a special property, and not a bare charge.  
 Art. 11.

§ 10. *Having goods on bailment*, second rule, above; see Bailment, Ch. 17. Wherever the bailee fairly acquires a special property, as in many cases in that chapter and in others, he cannot in any case be guilty of larceny, but may be if he first receives the property with intent to steal it. And it is the sole province of the jury to decide with what intent an act is done. As to what delivery by the owner to his bailee gives him a special property, see Ch. 17. Generally it must be a delivery that changes the possession clearly, and so honestly obtained by the bailee; for if obtained by him with intent to steal, though by the owner's delivery, such taking is felonious. See *Pear's case*, a. 6; and 1 *Leach*, 253; *East's C. L.* 685 to 689. A hired B's horse to go ten miles and sold him on the way; adjudged larceny, as the jury found A took him with intent to steal him;—evidence was his so selling and giving a false account of himself when he hired the horse. 1 *Leach*, 456. So where A obtained a horse by pretending B wanted to hire him to go to C, but in truth with intent to steal the horse; and not going to C, but taking him elsewhere and selling him, was deemed evidence of such intent, and felony. *East's C. L.* 690.

§ 11. *Privity of contract at an end*, third rule, above. As where A hires B's horse for one day, or to ride to such a town, after the day is expired, or he has arrived at the town, the purpose is answered, and this privity is determined; and if A rides further or uses the horse for the day and sells him, or otherwise converts him to his own use, he is guilty of felony. *East's C. L.* 693, 694. For as soon as the special property of the holder is over or determined by the special purpose for which delivered to him being answered, then the possession, which follows the right of property, is again in the owner, in the same manner as if there had been no precedent delivery; after that any new taking of the party for his own use is a trespass in law, and if it be done with a felonious intent to steal, of which the jury are to judge, will amount to larceny. *Id.* 694.

*Leigh's case*,  
*A, D.* 1800.

So where the jury found that A, who assisted in removing B's goods from a fire, in his presence, but without his desire, and that A afterwards concealed them, and denied having them, yet took them honestly at first, and that the evil intention to convert them came on the taker afterwards; held, no felony; because A first took them honestly, and as evidence thereof, A first took them in the owner's presence. [And no new taking after a trust determined.]

§ 12. *As to night-time, and dwelling-house*, see Burglary, Ch. 212, especially dwelling-houses, article 3, and night-time, article 8, where these matters are largely considered.

I do not find the Roman laws made the distinction between day and night-time, further than sometimes as matter of evidence in ascertaining what was *furtum manifestum et non manifestum*, manifest theft, that is, when taken with the main-our, was punished with four fold damages ; theft not manifest, with double. This distinction occasioned much inquiry which the one or the other, often unnecessarily. In these inquiries we often find the true distinctions.

He was capitally convicted and hanged, for attempting, when armed with pistols, to rob Major Bray, and threatening to use his arms, in the day-time, in the highway, if Bray refused to deliver his money.

Ch. 214.  
Art. 12.  
Martin's case,  
1821, near  
Boston.

ART. 12. Other material expressions in our statutes, such as *putting in fear, force and violence, from the person of another*, further explained by late decisions.

§ 1. Robbery is compound larceny. The value of the goods taken is not material. Defined by Hale, &c. a. 7, s. 4 ; in Massachusetts statute of 1805, a. 3, s. 8, ante. East says, it is aggravated larceny, from the person, or in his presence, against his will, by violence or putting in fear ; but something must be taken. The more ancient decisions have already been considered.

East's C. L.  
ch. 16, s.  
126.

§ 2. *Force and putting in fear.* Force and violence is of various kinds, as already appears, and will further appear. But violence or putting in fear is sufficient to constitute robbery ; and it is enough either be laid in the indictment, if it appear the property is taken against the will, or without consent of the party, by violence or putting in fear. As to violence, no sudden taking of the thing from the party unawares is robbery, as snatching any thing from the hand or head, unless there be some personal injury done to him ; or unless there be some previous struggle for the possession of the property.

East's C. L.  
ch. 16, s. 127.

Where a runner at the police office, was indicted for highway robbery, on Jane Edwards, and adjudged guilty ; he took money out of her hand and pocket whom he had before handcuffed, and was conducting her to prison, under pretence of letting her go home, and paying for coach hire and liquors he had ordered himself. The jury found that all this was done with a felonious design to get her money ; though she had before offered him the money if he would let her go home, and repeated the offer after he had so taken it.

A. D. 1783,  
Gascoigne's  
case.

§ 3. So where the prisoner assaulted A, meaning to commit a rape, and she, without any demand from him, offered him money, which he took and put into his pocket, but continued to treat her with violence to effect his purpose, till interrupted by a third person. Held, robbery, by a majority of the judg-

A. D. 1787,  
Rex v. Black-  
ham, s. 127,  
128.

Ch. 214. es; for she, from violence and terror, occasioned by his conduct, and to redeem her chastity, offered the money, and Art. 12. he, by taking it, derived that advantage to himself by his felonious conduct, though his original intent was to commit a rape. So compelling the owner of goods to sell them for less than their value, is force and violence, and robbery if the compulsion be by violence or well grounded fear. But the degree of force, violence, or fear, essential to constitute robbery, has never been defined, and in its nature is incapable of a precise definition, and as well as to kind as degree.

East's C. L.  
ch. 16, s. 129.

§ 4. *What is meant by putting in fear.* It seems by the late decisions the fear may be of three sorts: 1. Bodily harm: 2. Loss of character: 3. Loss of property. The general rule is as above stated; this fear must be such as to induce, in reason and common experience, the owner to part with his property against his will; and his motive may be to prevent bodily injury, loss of character, or of property; but in what degree is no where fully decided as to either.

East's C. L.  
ch. 16, s. 130,  
A. D. 1779,  
Rex v. Don-  
ally.

§ 5. *Loss of character.* As where the prisoner and A were in the street one evening; A was accosted by him (a stranger to him) with a desire he would give him a present. A asked, for what? The prisoner answered, "you had better comply, or I will take you before a magistrate and accuse you of an attempt to commit an unnatural crime." A then gave him half a guinea, which the prisoner said was not sufficient, but A had no more in his pocket. Two days after, in the evening, A again met him in the road, and he used the same threats as before, adding, it would go hard with him unless he could prove an *alibi*; here he got a guinea and departed. A swore he was much alarmed on both occasions, and under that alarm gave his money, apprehending it might cost him his life &c. Jury found the prisoner guilty, and said they were satisfied A delivered his money through fear, and under an apprehension it might cost him his life. And adjudged robbery. Eleven of the judges gave their ideas as to the nature of the fear, moving the party to part with his property, in cases of no actual violence. P. 716 to 728. In this case there was a like threat; and the money was extorted by threatening to charge the party with an unnatural crime. The jury said they thought such an accusation would strike a man with as much or more terror than if he had a pistol at his head; and found him guilty. Judgment accordingly. And nine judges present observed, that to constitute robbery there was no occasion to use weapons, or real violence, but that taking money from a man in such a situation as rendered him not a free agent; as if the person so robbed is actually in fear of a conspiracy against his life, or character, was such a put-

Rex v. Jones.

ing in fear as would make the taking of his money under that terror a robbery. So was Brown's case. And it is robbery, on such a threat, if the party part with his money only from a fear for his character, and from no other fear. A. D. 1783. Where there is no force, there must be terror in fact, at the time of the delivery or taking of the goods; otherwise there is neither actual nor constructive violence in the taking, so no robbery.

CH. 214.  
Art. 12.

Hickman's  
case, s. 132.

§ 6. *Fear of loss of property &c.* As where the prisoners threatened to bring a mob from Birmingham, (then in a state of riot and disturbance,) and burn the prosecutor's house down, if he did not give them money, which he did under the fear of that threat. Held, robbery. But otherwise, if, on such a threat, there is no fear for his person or character; but the party gives money in order to convict the offender. And the fear must exist at the time the property is taken, not be raised after it is taken.

East's C. L.  
ch. 16, s. 131,  
132, Rex v.  
Astley & al.,  
A. D. 1792.

§ 7. But paying money under the fear of being sent to prison, which was threatened for not paying for a lot of goods, charged to have been bid for at a pretended auction, is not sufficient ground of terror to constitute robbery; being but a *simple duress*. S. 131. There must be violence or fear, in fact; hence if the property be not taken by violence, or parted with through fear, it is no robbery; though there be sufficient legal and reasonable grounds for fear; as upon a threat to charge one with an unnatural crime; as where the prosecutor swears he was under no apprehension when he gave his money to the prisoner, but gave his money to him to convict him, he negatives the robbery. Here is neither actual nor constructive violence.

Rex v. Wood  
& al., A. D.  
1796.

Reane's case,  
A. D. 1794.

So in Simon's case, adjudged robbery. The threat was to destroy Rowe's dwelling-house and mow of corn; so that the well grounded fear, in this case, was that of losing his house. And is there any case, as yet decided, in which the fear of losing any other property than his dwelling-house has been deemed this well grounded fear? In Rex v. Wood & al., above, the fear was a woman's fear of being sent to prison for a debt, by conspiracy, falsely demanded; so a fear of a loss of personal liberty, and of some money to pay the debt and costs, she feared might be fraudulently recovered; but adjudged this did not constitute such a well grounded fear as is required to make the offence robbery. One reason given by the judges was that she had for this wrong a civil action, "which could not be if the fact amounted to felony." Grose J. said, he could not distinguish this case, on principle from Rex v. Astley & al., though he did not agree with that case. Eyre C. J. thought the two cases very different; that the question for the jury was, whether the money were delivered under

Simon's case,  
s. 131.

Rex v. Wood;  
remarks  
thereon.

**CH. 214.** the impression of terror. Ashhurst J., in delivering the opinion  
**Art. 12.** of the judges, observed, "there was no reason for such a degree of terror, in this case, as to induce the prosecutrix to part with her money; she might have known, that having done no wrong, if she had been taken to prison, the law would have taken her under its protection, and set her free; and that the law did not allow the fear of being sent to prison to be a sufficient ground of terror to constitute a robbery." Is there not something very defective in this reasoning? How could the law protect her against this conspiracy and false swearing, unless she could prove both? The very thing she dreaded was, and truly, that the prisoners would swear a debt against her in a manner to hold her in prison till she paid it, or gave bail, finding herself in their hands alone, and aware she had no evidence to prove conspiracy and false swearing. In every case, if the party can so prove his innocence as that the law can and will protect him, and he may know this, he has nothing to fear, and so no well grounded terror or fear. The very ground of his fear, and what raises in his mind the real terror is, a real apprehension that, though perfectly innocent, he has it not in his power to prove his innocence, or to defeat the false swearing he really apprehends there will be against him, when he is aware the threats can be executed by perjury, that will pass for true swearing, because he has no sufficient evidence to prove it perjury, though in fact so. In fact in every case of false accusation, and of threats to prove one guilty of a crime by false swearing, it is this false swearing itself which is the very thing that truly puts the party in fear, and excites the legal dread in his mind. Therefore if Sarah Wilson, the woman charged with the debt, was aware she had evidence to prove she owed nothing, it was begging the question to say she knew the law would protect her; for truly she knew it could not protect her from imprisonment or paying, unless she could prove what, as the case is stated, she must have apprehended she could not prove. So if a man's house is pulled down by a mob, because he refuses to give them money, has he not a remedy by a civil action? Clearly he has, as evidently as Sarah Wilson could have had for false imprisonment; and much more in fact, because, as in *Rex v. Astley*, the owner of a house can hardly have any difficulty in proving the wrong done by a mob's pulling it down. But had Sarah Wilson been imprisoned, in fact falsely, it does not appear she had a right to expect any evidence to prove false imprisonment; therefore do not the reasons of the court as to a civil action, and of Ashhurst J. as to her knowing the law would protect her, totally fail? Both seem to have taken it for granted she would have had a remedy the case

does not shew she had any right to expect. It will be observed that Reane's case turned on fear or terror in fact, not on any legal idea of putting in fear. The inference from all which clearly is, that though we use these words, *putting in fear*, so profusely in modern statutes, yet there can scarcely be an expression more vague and indefinite; especially when extended as of late years, not only to bodily injuries, but also to character and property.

CH. 215.  
Art. 1.

## CHAPTER CCXV.

### MURDER AND MANSLAUGHTER.

#### ART. 1. *What is murder or not.*

§ 1. As much as has been already written on these subjects of murder and manslaughter in prior chapters, under the heads of Evidence; and especially in Ch. 91, s. 10, Issues in criminal cases, evidence proving, &c.; Ch. 197, s. 7, Malice express or implied, sundry cases, as those of Halloway, of killing in excessive correction; of wilful poisoning; of sudden killing and without provocation; of killing an officer &c. doing his duty; of killing, no provocation by words or gestures; of Mawgridge in the guard-room, and cases therein cited; of Gray at the anvil, and remarks thereon; of killing a mere trespasser on land &c. only manslaughter, case of Huggett &c. and several cases of sufficient provocation; art. 8, s. 9, 10, Ch. 197, Principals and accessories tried &c. in several cases of murder and manslaughter; Ch. 212, *Homicide*, art. 2, what homicide is murder or not, manslaughter or not, several cases; and there Coke's definition of murder; also Hale's;—explained by sundry cases as to what constitutes murder, manslaughter, excusable or justifiable homicide; self-defence &c.

Forms of indictments, see 4 Wentw. 45 to 50.—Cro. C. C. 482 to 509.—See many indictments for murder in Crown Circuit Assistant.

§ 2. *Further cases of murder.* "If A shooteth at the poultry of B, and by accident kills a man, if his intention was to steal the poultry, which must be collected from the circumstances, it will be murder, by reason of the felonious intent; but if it was done wantonly, and without that intention, or incau-

East's C. L. 256.—Foster's C. L. 259.—East's C. L. 198, 219, 223, &c. 230.—1 Hale, 429, 451, 39, 475.—1 Hawk. c. 39, s. 4, 5, 6.—3 Inst. 48.—4 Bl. Com. 200.—East's C. L. 221, 223, 267.—9 Co. 81.

CH. 215.

Art. 1.



tiously, it will be barely manslaughter." So if A mean merely to commit a trespass, it is only manslaughter, as above. Yet it is said, if A mean to beat B, though he intend not death, but death ensues, it is murder, or manslaughter at least. This must be admitted as before explained. It is murder, if death be the *probable* consequence of A's act, but otherwise, not. If A kill himself in attempting to kill B, it is felony. East, 230.

Agnes Gore's case, 1 East. C. L. 229, 230.

§ 3. Agnes Gore was indicted for the murder of one Martin, and adjudged guilty. She sent to Martin for an electuary for her husband, which Martin sent, and she put poison into it to poison her husband, of which Martin eat of his own choice, not knowing the poison was in it, of which he died. Held murder in her, by all the judges of England. A doubt at first arose from circumstances peculiar to this case: 1. Martin eat of the electuary so mixed, of *his own choice*, no one exciting him to do it: 2. He with his knife stirred up the electuary, and so more effectually mixed the poison in it; and so made what he eat much stronger and more poisonous than what she made it;—for as she made it, several eat of it, but lived, though sick. So giving judgment of death without jurisdiction, if executed, is murder in him who commands it to be put in force. So if an officer vary the mode of execution.

Crown C. C. 494.

3 Bac. Abr. 662, cites Stam. 36.—3 Inst. 91.—Plow. 19.—Dalt. c. 93.—Hale's P. C. 434.

§ 4. If A by duress of imprisonment compel B to accuse an innocent person, who on his evidence is condemned and executed, this is murder in A. So if A incites a madman to kill himself or another, this is murder in A;—so if he by force takes B's arm and the weapon in his hand, and therewith stabs C, whereof he dies, this is murder in A. And East's C. L. 229.

1 Hale's P. C. 432.—3 Bac. Abr. 664.—1 East, 215, 231.

§ 5. A man is infected with the plague, having a plague-sore running upon him, and goes abroad to the intent to infect another, and another is thereby infected, and dies; this it seems is murder by the common law; but if no such intention clearly appears, though he infect one, then it is only a misdemeanor.

Haw. P. C. 80.—Dyer 186.

§ 6. If A procure a woman with child to destroy it when born, and after born she kills it, this is murder in her, and A is accessory to murder.

3 Bac. Abr. 665.—2 Buls. 147.—Crom. 22.

§ 7. Two persons meet in cool blood and fight on a precedent quarrel, and one is killed, it is murder in the other. This the law deems malice; and no excuse he was struck first by the deceased, or had often declined fighting; or was prevailed on to do it by importunity, or only to vindicate his reputation; or that he meant not to kill, but only disarm his adversary. For since he had deliberately engaged in an act

highly unlawful, in defiance of the laws, he must, at his peril, abide the consequences. And not only he who kills, but his seconds are guilty of murder. And a man is deemed to fight in cool blood, when he meets in the morning, on an appointment made the night before; or in the afternoon, on one made in the morning; or other reasons that shew he is cool and master of his temper.

§ 8. If A on a quarrel with B, tell him he will not strike him, but that he will give B a pot of ale to strike him, and thereupon B strikes, and A kills B, this is murder; for A shall not elude the justice of the law by such a pretence to cover his malice.

§ 9. Watts came along by Brains' shop, and distorted his mouth, and smiled at him, Brains killed him,—adjudged murder, for it was no provocation that abated the presumption of malice in Brains.

§ 10. A and B are at some difference, A bids B take a pin out of the sleeve of A, intending thereby to take an occasion to strike or wound B; B takes the pin accordingly, and then A gives B a blow, whereof he dies, this is murder: 1. Because here was no provocation, as B took the pin by A's consent: 2. Because it appeared to be a malicious and deliberate artifice, thereby to take occasion to kill B.

ART. 2. § 1. To kill an officer, in the execution of his office, is murder. So if a private person endeavour to part two fighting, and is killed by one of them, this is murder; and it is no excuse that what he did was in a sudden affray, in the heat of blood, and through violence of passion. But if such person do give notice for what purpose he comes, by commanding the parties in the king's name to keep the peace, or otherwise clearly shewing his intention to be not to take part in the quarrel, but to appease it, he who kills him is guilty of manslaughter only. So it is murder to kill an officer, attempting to arrest one on a warrant irregular or illegal. 7 D. & E. 455, cited M'Nally, 336.

§ 2. And whoever kills the sheriff, or any of his officers, in the lawful execution of a civil process, is guilty of murder. And it is no excuse to such person, the process was erroneous, (for it is not void by being erroneous,) or that the arrest was in the night, or that the officer did not tell him for what cause he arrested him, and out of what court, (which is not necessary when prevented by the party's resistance,) or that the officer did not shew his warrant, which he is not bound to do at all, if he be a bailiff commonly known, nor without a demand if he be a special one. But where a warrant, by which he acts, gives him no authority to arrest the party, it is but manslaughter. So if executed out of the jurisdiction of the

CH. 215.

Art. 2.

And see 1  
Haw. P. C.  
82.—Hale's  
P. C. 463.—  
Sid. 177.—  
Lev. 180.  
Haw. P. C.  
81.

Cro. El. 778,  
case of  
Brains, cited  
Hale's P. C.  
465.

1 Hale's P. C.  
467.

Keil. 66.—  
9 Co. 68.

Haw. P. C.  
86, c. 25.—3  
Bac. Abr. 668,  
669.—Hawk.  
ch. 28, s. 16.  
—East's C.L.  
294.—Fost.  
270, 308.



Ch. 215.

Art. 3.

1 Hal. P. C.  
460, 461.

court. So only manslaughter, if the constable of A be killed in attempting to suppress a tumult in B, as there he has no authority. And if the party be an officer, though only a watchman, he is presumed to be known, and need not notify himself, though in fact not known to the person killing him. But if a private bailiff, the party must know he is such, or there must be some notice of it, whereby the party may know it, as by saying, *I arrest you*, which is of itself sufficient notice, and it is at the peril of the party, if he kill him after these words, or words pronounced to that effect. It is murder, if in fact bailiff, and had a warrant. It is presumed a constable is known in his town in the day time, but not in the night. It is notice if he command the peace in the king's name.

ART. 3. *Further cases of murder.*

2 Stra. 766,  
774, Rex v.  
Oneby; cited  
in East's C.L.  
262, 263, 264.

§ 1. Oneby was indicted for the murder of W. Gower, and adjudged guilty. February 2, 1725, the deft. and Gower were in company with A, B, and C, in a tavern, in a friendly manner, about two hours; then the company began to play at hazard, and played some time, then A asked if one would set him three half crowns; on this, Gower, in a jocular manner, laid down three half-penny pieces, and said to A, I have set you three half pieces; the deft. at the same time set to A three half crowns, which A won. Immediately the deft. turned and said to Gower, it was an impertinent thing to set half-pence, and he was an impertinent puppy for so doing; Gower answered, whoever called him so was a rascal. Thereon the deft. took and threw a bottle, with great force, towards Gower, but did not hit him, but it brushed his wig; Gower immediately tossed a candlestick or bottle towards the deft., but did not hit him. Gower and the deft. both rose and fetched their swords, both hung up in the room; Gower drew his, but the deft. was prevented drawing his by the company, and Gower threw away his, and all set down for an hour. Then Gower said to the deft., we have had hot words, but you was the aggressor, but I think we may pass it over, and offered his hand to the deft.; to which he answered, *no, damn you, I will have your blood*. Afterwards the reckoning was paid by all five, and all but the deft. left the room to go home, and he, left alone in the room, called to Gower in these words, *young man, come back, I have something to say to you*; and Gower returned, and immediately the door was flung to and shut, and the rest of the company excluded, and then a clashing of swords was heard, and the deft. gave the mortal wound, of which Gower died the next day. The deft. received three slight wounds. And on his death bed Gower said, he thought he received his wound in a manner swordsmen call fair. No

reconciliation between the deft. and Gower after throwing the bottle. The second argument was before all the judges of England, who unanimously held this murder. This is "*a killing with a wicked design.*" "All held Mawgridge's case law." Held, the deft., Oneby, guilty of murder on express malice, for he said he would have Gower's blood, who had acted innocently; he set the half-pence to A, not to the deft.; A did not resent it, because pleasantly done; and no provocation to the deft. to be angry and abuse Gower; his return was proper; if not, but ever so improper, it was no provocation in law; deft. then threw the bottle with great force; though it only touched his wig, it would have been murder if it had killed him; Gower drew his sword to defend himself, if he drew it first; then Gower acted properly, offered reconciliation; the deft's. answer to this "is the strongest evidence of express malice," it shews he was determined to take Gower's life; the deft's. calling Gower back shewed a sedate mind; the interchange of wounds altered not the case. This cause was argued, and the court's opinion given, at great length; and is one of those causes in which every fact is material; hence is thus stated at large, in regard to the facts and the main reasons of the judges. Court judges of the malice, and if time to cool, on a special verdict.

He who wilfully gives poison to another, provoked or not, is a murderer; because a deliberate act. And if A come to serve a writ on B, and he kills him, this is murder; for here is no provocation. So to demand a debt.

§ 2. It is a settled rule, if A does an act meaning to do a felony, as steal poultry &c., and death ensues, it is murder, as he intends a felony. So if the act of one having such intent immediately cause a third person's death, it is murder; and also it is where his act occasionally causes a death. As where the husband gave his wife a poisoned apple, who eat not enough to kill her; and innocently, against her husband's will and persuasion, gave part of it to a child, whereof it died; this was murder in the husband.

§ 3. So if A mean to kill B, and his blow miss him and kills C, it is murder, though he meant no malice to C; for the law transfers the malice to the party slain.

§ 4. If a man, knowing people are passing along a street, throws a stone over a house or wall with intent to do hurt to people, and one is killed, this is murder; and if without such intent, it is manslaughter, and not barely *per infortunium*, because the act itself was unlawful. But if the man were tiling a house, and let fall a tile knowingly, and gave warning, and yet a person is killed, this is *per infortunium*; but if he gave not convenient warning, it is manslaughter, *quia non adhibuit de-*

CH. 215.

Art. 3.

1 Hal. P. C. 466.

3 Bac. Abr. 670; cites Kelyng, 117. —Dalt. c. 93. —Plow. 101, 473.—Hal. P. C. 466 & 486.

1 Hal. P. C. 466.

Hal. P. C. 476.

CH 215. *bitam diligentiam*. This case confirms the distinction made in a former chapter ; that is, if the unlawful act be done intending personal hurt, and death ensues, it is murder ; but if

Art. 3. the unlawful act be done not intending a personal injury, and not probably attended with death, but one is killed by it, this is but manslaughter. But is letting fall the tile, as supposed, that by any possibility may kill a person, a lawful act? It may be if on private ground. And it is murder if the malice extend only to a corporeal damage, as to beat one. So if the malice be against another. So if the malice be in another person ; as if one commits murder, all present and aiding are guilty of murder, though they had no particular malice against the party killed.

4 Com. D.  
433.—H. P.  
C. 49, 50, 51.

And Dougl.  
207, 212, Rex  
v. Borthwick.

As if there be a duel between A and B, and C be A's second, who kills B, this is murder in C. And if, on an indictment for murder, the jury find a special verdict, to affect the principals in the second degree, it must be stated : 1. That they were actually present : or 2. Or some acts done by them at the time, which unavoidably shew they were present : or 3. That they were of the same party, on the same pursuit, and under the same engagements and expectations of mutual defence and support with the person who did the fact.

1 Hal. P. C.  
435.

§ 5. If A command B to beat C, and he does it, and C thereof dies, this is murder in B, also in A, if present ; but if absent, he is accessory to murder. But if B, on such command, beat D, and he dies, A, if absent, is not accessory to the murder ; because as to him his command shall not be construed further than as to the person he intended, and he intended not D.

Saunders'  
case.

1 Hal. P. C.  
436.

§ 6. If A counsel or command B to beat C with a small rod, which could not, in all human reason, cause death ; if B beat C with a club, or wound him with a sword, whereof he dies, it seems that A is not accessory to this murder ; because there was no command of death, nor of any thing that could probably cause death, and B has varied from the command in substance, and not in circumstance. So A is not accessory, if he countermand his advice before any act is done by B, and he kills afterwards. But A's private repentance, without recalling his advice or command, has no effect.

Hal. P. C.  
439, 443, Da-  
cre's case.

§ 7. Lord Dacre, and divers others, came to steal deer in Pelham's park. Rayden, one of the company, killed the keeper in the park ; Dacre and the rest being in the other parts of the park. Held, murder in all. Yet they come to commit one kind of crime, and Rayden committed another kind ; but said in pursuance of their intent to resist all opposition.

§ 8. And if A comes and kills a man, and B runs to aid

him, if needed, but in fact does nothing, yet he is principal, being present ; and also he concurs in the intention to commit the crime, and ready to act his part whenever wanted.

CH. 215.  
Art. 4.

§ 9. It is murder to kill one on a slight or trivial provocation. Several cases ; as a slight box on the ear ; so a slight blow with a cane. Yet such may justify chastisement in a manner not likely to endanger life ; a mere intention to correct ; not a brutal violence, or implacable malice, or revenge, or using a deadly weapon. Equality of combat between the parties is also necessary to extenuate the killing, and to reduce it to manslaughter. Several cases, 242, &c. and Ford's case, at least at the onset.

East, 232, 255.

§ 10. So it is murder in A, if by his counsel B kill himself.

ART. 4. *Further cases of manslaughter.*

13 Mass. R.  
386, Commonwealth v.  
Bowen.

§ 1. Manslaughter or simple homicide, is the voluntary killing another, without malice expressed or implied ; and differs not, in substance of the fact, from murder ; and differs only in this : 1. In the degree of the offence, murder being aggravated with malice, presumed or implied ; but manslaughter not ; hence in manslaughter there can be no accessories before the fact : 2. In the form of the indictment.

3 Bac. Abr.  
671 ; cites  
Hale's P. C.  
460, 466.—  
3 Inst 55.—  
Fost. 262,  
264—Haw.  
F. C. 7.

§ 2. By manslaughter is understood such a killing as happens either on a sudden quarrel, or in the commission of an unlawful act without any deliberate intention of doing mischief ; and on indictment for murder, the deft. may be convicted of manslaughter, and acquitted of murder.

1 East, 218,  
219, 260, 262,  
264, 266, 232,  
255.

§ 3. If the owner of a wild beast, bull, cow, ape, or monkey, &c. have notice of its quality and disposition to do mischief, by hurting persons, and do not use due diligence to keep it confined, but through negligence the beast goes abroad, after warning of his condition, and it kills a man, it is manslaughter in the owner ; and if purposely let loose to do mischief, it is murder, if only to frighten people.

Hale's P. C.  
431.—2  
M'Nally, 557.  
—East's C. L.  
231, 265.—4  
Bl. Com. 197.

§ 4. If two fall out suddenly, and presently agree to fight, and each fetch a weapon and go into a field, and there one kills the other, it is manslaughter only ; because done in the heat of blood. And if a person see two fighting on a private quarrel, whether sudden or malicious, takes part with one of them, and kills the other, it is but manslaughter. So if two strive for the wall, and one happen to kill the other ; or a man happens to kill another, who, claiming a title to his house, attempts forcibly to enter it &c., or to kill one who endeavours unlawfully to arrest him, or to force him from his possession of a room in a public house ; or if a man immediately kills one whom he finds in bed with his wife, or that pulls him by the nose, or flips him in the forehead, or ac-

Haw. P. C.  
82 ; cited 3  
Bac. Abr.  
666, 667.

East's C. L.  
234.

CH. 215. tually strikes him ; in all these cases the party is at most only guilty of manslaughter. *Secus*, if provocation be trifling.

Art. 4.

12 Co. 87.—  
Cro. J. 296.  
—Hale's P.  
C. 453.—  
Fost 294.—  
Rowley's  
case, Cro. J.  
294.

1 Hale's P.  
C. 440, 444,  
Basset's case.  
—East's C.  
L. 259.—1  
Hawk. c. 31,  
s. 47.

Dacres' case,  
443; and see  
East's C. L.  
257.

§ 5. So where A's son and B's son fall out in the field and fight, and B's son is beaten, and runs home to his father all bloody, and B presently takes a staff, runs into the field, being three quarters of a mile distant, and strikes A's son, and kills him, this is only manslaughter, because done in a sudden heat of passion ;—blow was with a small cudgel. East, 237.

§ 6. A with above thirty others entered with force on Basset's manor-house, and ejected out of it Basset, his children, and servant. Three days after, twenty others on Basset's behalf came in the night with weapons, with intent to re-enter, and one of the twenty about 10 o'clock in the night, cast fire into a thatched house adjoining to the house, whereon one in it shot off a gun, and killed one of Basset's party, and then the rest of it fled, and A and his company continued forcible possession of the house for many days after. A and twenty-seven more were indicted for murder, and found guilty of manslaughter ; so all guilty of A's crime, for all came to commit a riotous, unlawful act, and his killing was in pursuance of the object of this assembly. And in these cases it is a settled rule, to make all of the company guilty of manslaughter &c. when one of it kills a man, it must be a killing in pursuit of that unlawful act they meet to do ; as in Dacres' case above, "they all came with intent to steal deer, and consequently the law presumes they came all with the intent to oppose all that should hinder them in that design ; and consequently, when one killed the keeper, it is presumed to be the act of all, because pursuant to that intent ;" that is, it was part of the plan or design to kill or remove out of their way all who opposed them ; and it is understood the keeper did oppose them &c. But suppose A, B, C, and divers others meet to commit a riot, as to steal, or pull down inclosures, and in their march upon their design, A meets with D or some other, with whom he had a former quarrel, or by reason of some collateral provocation given by D to A, A kills him without any abetting by any of the rest of the company ;—though this is manslaughter or murder in A, yet the rest of his company are not guilty of either, though present ; nor of aiding &c. ; for this killing by A was accidental, and not within the compass of their original intention, as out of their plan or design A's quarrel with D no way arose. But if when they came to kill the deer or throw down the inclosures, any had opposed them in it by words or actual resistance, and A had killed him, it had been murder in all the rest of the company, that came with the intent to do that unlawful act, though there were no express intention to kill any person in the first enterprise, for

the law presumes they come to make good their design against all opposition to their object, and in such case there seems to be by the whole a tacit authority to each in behalf of all, to remove or put down such opposition. These principles will aid us in explaining many cases. Though these principles are clear, there will remain a question of difficulty in many new cases arising; that is, what act done by one or some of the riotous assembly, does or does not come within their plan or design. And all such cases are manslaughter, where the killing is on a sudden quarrel.

Ch. 215.  
Art. 4.

§ 7. Where there is a common nuisance in the highway, by A, B, C, D, in a vill of M——, and E, F, G, H, &c. and twenty more of the inhabitants of M—— come to remove it, A, B, C, and D oppose; F strikes A suddenly and kills him, whereby F is guilty of manslaughter; but the rest of his company are not guilty, merely because of the company; but only those who actually assist F to strike and kill A; for in this case F and his company come to do a lawful act, as remove the nuisance;—hence guilty of no unlawful combination; so not responsible for what one of the company does of his own head, not advised or abetted by the rest. But if, in truth, no nuisance exist, but an act lawful to be done by A, and then A had been killed by F, all the rest of F's company had been guilty that came with the design to remove that which they deemed a nuisance, but which was not one; because in this case F and his company is a riotous and unlawful assembly. There then is a design in them all to do an unlawful act, and so responsible for what one of them does within their plan or design, as just explained in the case of *Dacres &c.*

1 Hale's P.  
C. 444, 445.

§ 8. If A comes to enter a house with force, and in order thereto shoots at his house, and B, the possessor, having other company in his house, shoots and kills A, this is manslaughter in B, but not in the rest of his company, because the assembly is lawful; and those, and those only, who actually abet are guilty of manslaughter, and principals, because of their actual abetting.

1 Hale's P.  
C. 445, Har-  
court's case.

§ 9. Whether manslaughter or murder, often depends on the instrument used in the case; as if A by indecent words provoke B, and B make use of a deadly weapon and kill A, this is murder; for using this weapon manifests an intention to kill, or to do some great bodily harm;—but if B, on such provocation, give A a box on the ear, or strikes him with a stick or weapon not likely to kill, and, against his intention, unluckily kills, it is but manslaughter.

Foster, 291;  
and Turner's  
case.

§ 10. In this case the verdict stated that Plummer and his accomplices were assembled in order to transport wool, of the growth of England, to France, contrary to the statute; that

Foster, 352,  
Plummer's  
case; and  
123, and 627,  
633, same  
Hale, 423.

case.—East's C. L. 258, 294.—1

CH. 215. an officer of the crown, duly authorized, met and opposed  
 Art. 4. them, and that during the scuffle which ensued, one of the gang  
 shot and killed another of them : held, 1. If the officer or any  
 of his assistants had been killed, it would have been murder  
 in all the gang.

East's C. L.  
 258, 259,  
 294, 296,  
 Plummer's  
 case.—Fost.  
 352; and 12  
 Mod. 627,  
 633; the  
 same case.

§ 11. 2. So it would have been murder in all, if the shot  
 had been levelled at the officer or any of his assistants;—and  
 so if one of the gang had been killed : Plummer discharged ;  
 and, says Foster, because it was not found the gun was dis-  
 charged in prosecution of the purpose for which the party  
 was assembled ; but had it been positively found, that it was  
 discharged against the officer or his assistants, the court upon  
 this finding might, without encroaching on the province of the  
 jury, have presumed, that it was discharged in prosecution of  
 their original purpose ;” for it might then have been presumed  
 this purpose did include the overcoming of such resistance :  
 3. But the books agree this killing of one of the gang by  
 another, was manslaughter in him : 4. The jury must find  
 the fact itself of shooting at the officer or his assistants, not  
 the evidence only . 5. If a man shoots, intending to kill one  
 man, and kills another, it is murder : 6. Indictment for man-  
 slaughter must state the act voluntarily done ; but if the act  
 be found, it shall be intended voluntary, being done by a man,  
 a free agent : 7. If two engage in an unlawful act, and a man  
 is killed by one, the other is guilty of murder ; but to make it  
 so, he should know of that malicious design, (that is, that it  
 was unlawful,) different from that engaged in : 8. A has  
 malice against B, and engages in a duel with him ; C, a  
 stranger, comes by chance and sides with A, who kills B ;  
 this, though murder in A, is only manslaughter in C, who is  
 present, abetting and assisting, because C comes there of a sud-  
 den, and knows nothing of the premeditated matter : 9. If  
 thieves go to rob, and two of them quarrel, and one kills the  
 other on a sudden quarrel, and no *malice prepense*, this is  
 only manslaughter in him, and no crime at all in his com-  
 panions, though all engaged in an unlawful act ; the killing is  
 distinct from their design : 10. So if divers come into a  
 park to hunt, having no right, and two quarrel, and one kills  
 the other, it is only manslaughter in him that kills, and no of-  
 fence in the rest, as the killing is not in pursuance of the  
 unlawful design they are engaged in ; and the one who kills  
 may act from a private grudge : 11. If there be an affray,  
 and a constable is killed in the execution of his office, if he is  
 not known to be constable, it is only manslaughter in him that  
 kills him, and no offence in the rest : 12. The act must be  
 deliberate, or it is but manslaughter, though an unlawful act,  
 as entering one's house against his will, and in it the owner is

killed, because the unlawful act is sudden, and not deliberate; arising out of a sudden quarrel about a dog &c. : 13. The deliberation must be to hurt somebody, either immediately or consequentially; that is, "mediately or immediately to hurt somebody : " 14. A man goes to shoot a deer in another man's park, and the arrow striking a tree glances and kills a man, it is only manslaughter; but Coke, 3 Inst. 56, 57, contrary,—an unlawful act : 15. If any felony be intended, and one is killed, it is murder, though not to hurt a person.

CH. 215.  
Art. 4.

§ 12. To kill an officer who does what is not warrantable is only manslaughter; but murder, if he execute his office legally or executes process only erroneous; and whether on the spot or coming or going, or officer or his assistant, sheriff, constable, or watchman; but he must be known, or notify with what intent he comes, by commanding the peace or declaring his office, otherwise but manslaughter. So only manslaughter if the process be defective in the frame of it, or mistake the accused's name, or if his name or the officer's is inserted without authority and after issuing the process; or the officer exceeds his power and is killed by the person whose liberty is invaded. So as in Tooley's case, this invasion is a provocation to all. And if a felony be committed, but not by the accused, and one attempting to arrest, kills or is killed, is but manslaughter; case of a private person. So if an officer arrests without warrant; so if a man kills one attempting to enter his house on pretence of title. If a traveller, before he lights from his chaise, fires a pistol and kills one by accident, it is but manslaughter.

4 Com. D.  
438.—Foster,  
308, 309, 310,  
311, 312.

East's C. L.  
295.—Foster,  
318 —  
1 Hale's P. C.  
490.

Stra. 481,  
Rex v. Bur-  
ton.—East's  
C. L. 266.

4 Com. D.  
439.

§ 13. If two fight and one breaks his sword, and a stranger gives him his sword with which he kills the other, it is manslaughter in both. So if two quarrel and part, and presently meet and fight, and one kills the other, it is but manslaughter, and though there was former malice, if they were reconciled, and afterwards fight again on a new occasion. A gives provoking language, B strikes, a combat ensues, A is killed,—is manslaughter. So if B draw his sword, but makes no pass till A has drawn also, this is manslaughter; but if B draws his sword and makes a pass at A before he draws his, A then draws, a combat ensues, A is killed, this is murder; for this pass, A's sword being undrawn, shews B sought A's blood, and A then rightfully endeavoured to defend himself.

Foster, 296.

§ 14. The prisoner indicted for murder came home in the night drunk; his father ordered him to bed, which he refused to do; whereupon a scuffle happened betwixt the father and son. The deceased in bed hearing this, got up, fell on the prisoner, threw him down and beat him on the ground, and there kept him down so that he could not escape, nor avoid

Foster, 276,  
Naylor's case.



CH. 215. the blows ; and as they were striving together the prisoner gave the deceased a wound with a penknife, of which wound he died. Doubted if manslaughter or *se defendendo* ; but held by all the twelve judges, manslaughter ; for there did not appear to be any inevitable necessity so as to excuse the killing in this manner. The deceased did not appear to aim at the prisoner's life, but rather to chastise him for his insolent behaviour to his father.

Foster's C. L.  
292, Sted-  
man's case.—  
East's C. L.  
234.

§ 15. If on words arising in the street, a woman strikes a man on the ear with her hand, and he gives her a blow on the breast with the pommel of his sword ; she flies, he pursues and stabs her in the back, this is manslaughter. Holt thought this murder, but afterwards finding she struck him in the face with an iron patten, and drew much blood, he held it manslaughter. The smart of the man's wound, and the effusion of blood might possibly keep his indignation boiling till the moment of the fact.

Foster's C. L.  
164, Broad-  
foot's case.

§ 16. Only manslaughter\* to kill one when the warrant is not obeyed. As where the captain of a ship had a press-warrant directing no person but a commissioned officer should be entrusted with the execution of it, and his name to be inserted on the back of it ; the captain appointed his lieutenant to execute it, and sent his boat with part of the crew to press, but the lieutenant staid in the ship ; the boat's crew some leagues distant from the ship boarded a ship and attempted to press, when one of them was killed ; held as above, only manslaughter, as they did not act according to their warrant. So if the officer's warrant be illegal. Leach's Cases, 188.

Adey's case.

1 East's C. L.  
226, 246.

So it is only manslaughter if an apprentice die by the master's neglect to take proper care of him. Where only manslaughter if the deceased begin to renew the quarrel, and it does not appear that the prisoner sought it with any prior

\* In translating the French Penal Code the word, *manslaughter*, is rarely used. Art. 295, "wilful homicide is styled murder." But art. 296, "murder committed with premeditation, or by lying in wait, is styled assassination." Arts. 297, 298, premeditation and lying in wait are so defined as to shew the French mean by assassination what we mean by murder. But arts. 299, 300, parricide and infanticide have our meaning. Art. 301, defines poisoning, and merits attention : it is "every attempt on the life of a person by means of substances which sooner or later may occasion death, in whatever manner such substances be employed or administered, and whatever may have been their effect." Art. 302, these four crimes are capitally punished, [and parricide with the loss of the right hand also.] And art. 303, and so are "all malefactors of whatever description, who for the accomplishment of crimes shall make use of tortures, or commit acts of barbarity." Art. 304, "murder shall be punished with death when perpetrated during, or immediately before or after, the commission of any other crime or offence ;" and "in every other case the person guilty of murder shall be punished by hard labour for life." Thus it is plain the word in the French language we translate *murder* has several meanings, and includes manslaughter and more ; hence, the French have no two words that express our notions of murder and manslaughter. And art. 321, murder is said to be excusable when provoked by blows or personal violence.

malice. And if A aim a blow at B that might be manslaughter, and by accident kills C, it is but manslaughter.

CH. 215.  
Art. 5.

ART. 5. *Murder, American statutes.*

Act of Congress, April 30, 1790.

§ 1. Sect. 3 of this act enacts, "that if any person or persons shall within any fort, arsenal, dock-yard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of wilful murder, such person or persons on being thereof convicted shall suffer death."

§ 2. Sect. 5 provides for the marshal's delivering the body of such murderer to be dissected. For murder on the seas, see Piracy. Sect. 7, manslaughter in such places is fine not above \$1000, and imprisonment not above three years.

Act of Congress, March 30, 1802.

Sect. 6 of this act enacts, that if any citizen of the United States, "or other person shall go into any town, settlement, or territory belonging to any nation or tribe of Indians, and shall there commit murder by killing any Indian or Indians belonging to any nation or tribe in amity with the United States, such offender being thereof convicted shall suffer death." As to Indians committing murder in the United States, see Ch. 214, a. 2.

§ 3. Sect. 21 of this act enacts, "the crime of murder when committed by any officer, seaman, or marine, belonging to any public ship or vessel of the United States, without the territorial jurisdiction of the same, may be punished with death by the sentence of a court martial." Manslaughter on the seas, see Piracy.

Act of Congress, April 23, 1800.—Toulmin's Kentucky Laws, 360; punishment, death.

§ 4. Sect. 1 of this act enacts, "that if any person shall commit the crime of wilful murder, or shall be present, aiding and abetting in the commission of such crime, or not being present shall have been accessory thereto before the fact, by counselling, hiring, or otherwise procuring the same to be done, every such offender who in the Supreme Judicial Court shall be duly convicted of either of the felonies or offences aforesaid, shall suffer the punishment of death." And one convicted of murder in a duel may be delivered to be dissected and anatomised.

Mass. Act, March 15, 1805.—Act of Maine, ch. 2.

Punishment varied by Mass. Act of Feb. 19, 1819.

§ 5. By this act it was enacted, "that whosoever shall commit wilful murder of malice aforethought, and being thereof convicted before the justices of the Supreme Judicial Court, shall suffer the pains of death."

Mass. Act, Feb. 28, 1785.

§ 6. This act enacted, "whosoever shall commit wilful murder upon premeditated malice or hatred," shall suffer death.

Provisional Act of 1697.

This Colony act enacted, "if any person shall commit any wilful murder upon premeditated malice, hatred, or cruelty,

Colony Act of 1646.

CH. 215. not in necessary and just defence, nor by mere casualty  
 Art. 5. against his will, he shall be put to death."

Colony Act  
 of 1660.

§ 7. This act punished self murder with infamy, by ordering the body of the suicide to be buried in some common highway, and a cart load of stones laid upon his grave. And thus in some infamous manner has the law of Massachusetts ordered the body of the suicide to be buried. But this kind of law since the American revolution has very rarely been executed; not one instance is recollected among the scores of self-murders remembered. It seems to have become a general practice to consider those who kill or destroy themselves as being insane.

§ 8. Thus in about 160 years Massachusetts has considered murder and punished it under four different descriptions. The law of 1806 describes it simply as wilful murder; that of 1785, as wilful murder of malice aforethought; that of the Province, as wilful murder upon premeditated malice or hatred, and that of the Colony added *cruelty*.

§ 9. But the most material thing to be observed is, that none of the acts, Federal or State, even undertake to define murder; all punish wilful murder. The old acts add of malice &c., a matter ever included in the very idea of wilful murder. Then wherever a question arises, has one committed wilful murder within any of these statutes, we have invariably to resort to the common law to inquire and find if by that wilful murder has been committed, or if the offence committed be wilful murder, or the same thing, murder by the rules and settled decisions of that law.

Mass. Act,  
 Feb. 26,  
 1783, as to  
 bastard children.—Maine  
 Act, ch. 2.

§ 10. Sect. 1 enacts, "that if any woman shall conceal her pregnancy, and shall wilfully be delivered in secret by herself of any issue of her body, male or female, which shall by law be a bastard, every woman so offending shall pay a fine not exceeding £50" to the State.

§ 11. Sect. 2 punishes the concealment of the death of such with the gallows, and binding to the good behaviour.

§ 12. Sect. 3 provides the grand jury in the same indictment may charge the mother of such child with wilful murder, as well as with either of said offences, and the jury of trials on such indictment may find her guilty of the murder charged; and if so, she may be convicted of murder and suffer death; but if only either or both of the said other offences, then this jury may acquit her of the murder charged, and find her guilty of said first mentioned offences or either of them.

Province Act  
 of 1696.

§ 13. This act enacted, that if the mother concealed the death of a bastard child, so that it could not be known if born alive or not, she should suffer death as in case of murder, except she could prove it were born dead.

§ 14. *As to manslaughter.* Section 3 enacts, "that if any person shall commit the crime of manslaughter," he shall be punished by solitary imprisonment, not above one year, and afterwards by imprisonment in the common gaol, or confinement to hard labour not exceeding three years. What is manslaughter or not, it will be observed is left to be ascertained by the rules and principles of the common law. So it was by the act of February 28, 1785; but by this act it was punished with the gallows and branding, imprisonment and binding to the good behaviour, any or all of these. Branding &c. discontinued, Massachusetts Act, February 19, 1819.

CH. 215.  
Art. 5.

Mass. Act,  
Mar. 15, 1805.  
—Act of  
Maine, ch. 2.

§ 15. This Colony law punished manslaughter with death, on Lev. xxiv. 17; Numb. xxxv. 20, 21.

Colony Law  
of 1649.

§ 16. If the mortal blow be given at sea, and the party die on shore in a foreign country, this is not murder cognizable by the courts of the United States, under the above act of Congress.

4 Dall. 426,  
U. States v.  
M'Gill.

§ 17. It is fatal to omit the technical words in an indictment for murder. This was a conviction for murder, at a court of *oyer and terminer* and general gaol delivery. A writ of error was brought to remove the proceedings into the Supreme Court of Pennsylvania, and on the return of the record, the *deft.* assigned the general errors, and the attorney general replied in *nullo est erratum*. Dallas, the *deft.*'s counsel, made two exceptions; the material one was, that though the assault is stated to have been done feloniously &c., yet the technical and essential epithets are not applied to the *striking, kicking, bruising, and knocking*, the real cause of the death, and not the assault.

2 Dall. 228,  
Respublica v.  
Honeyman,  
A. D. 1796.

§ 18. Section 4 of this act, as to the punishment of murder, manslaughter, *felonious maims*, &c. it is enacted, "that if any person with set purpose, and aforethought malice, or intention to maim or disfigure, shall unlawfully cut out, or disable the tongue, put out an eye, cut off an ear, slit the nose, or cut off the nose or lip, or cut off or disable a limb or member of any person, every offender, and every person privy to the intent aforesaid, who shall be present, aiding and abetting in the commission of such offence, or not being present, shall have counselled, hired, or procured the same to be done, upon due conviction thereof, in the Supreme Judicial Court, shall be punished by solitary imprisonment not exceeding one year, and by confinement to hard labour, or by imprisonment in the common gaol, not exceeding" ten years.

Mass. Act,  
Mar. 15, 1806.  
—Act of  
Maine, ch. 2.  
—Laws of  
Ken. by Toul-  
min, 349,  
360, 347, pun-  
ish murder in  
the 2d degree  
in the peni-  
tentiary, 6 to  
18 years.—  
Manslaugh-  
ter, as it is  
voluntary or  
not, Act Dec.  
20, 1800.

§ 19. Before this act was passed, this crime was in this State punished at common law, by which this crime was defined nearly as in the above statute; but not exactly; at common law striking out a tooth was part of the offence, not a jaw tooth, and at common law it was viewed as an aggravated

Act Dec. 19,  
1801.—4 Bl.  
Com 121.—2  
Com. D. 126.

CH. 215. battery. Remedy, an action of trespass, *vi et armis*, and by indictment, fine, and imprisonment.

Art. 6.

Act of Con.  
April 30,  
1790.

§ 20. Section 13 of this act enacts, (copied from the Coventry act nearly,) if any one on purpose, and of malice aforethought, shall unlawfully cut off the ear or ears, &c. as Ch. 172, a. 9, s. 29, &c. punishment is imprisonment not exceeding seven years, and fine not exceeding \$1000. As *maims* are thus accurately defined by Federal and State statutes, the common law notions, as to this offence are generally of no importance. See Ch. 172, a. 9, s. 29.

§ 21. We find but very little said of the crime of *mayhem* in the American books, and not much in the English books for many years. These kinds of barbarities were much more frequently committed in more savage times. Several cases at common law, &c. East's C. L. 393 to 403. *Maims*, at common law, formerly were viewed as felonies; but of late years, aggravated trespasses; since only punished by fine and imprisonment. There were English statutes passed on the subject as early as 5 H. IV.; but the principal one was the Coventry act, of the 22 and 23 Car. II., which made *mayhem* felony and death. Never adopted here. East, 394, &c. states several cases, which may serve as constructions of our statutes, by shewing what is a slitting of the nose, &c. &c. in what form the indictment ought to be, and what may be in defence.

ART. 6. *Cases decided in Massachusetts.*

Mass. S. J.  
Court, Lin-  
coln; July  
1796, Com-  
monwealth v.  
M'Clausland.

§ 1. In this case McClausland was indicted for the murder of Mrs. Warren. On being brought into court, he pleaded guilty. The court stated to him the nature of his plea, and suggested to him he might withdraw it, and plead not guilty, and that thereby he only put himself on trial. He said, he killed the woman, and he did not like to tell a lie about it. The court did not then record his plea, but remanded him. The next day he was brought into court again, and the court again suggested to him he might retract his plea of guilty, and plead not guilty; but he would not retract it. The court then examined several witnesses as to his insanity, and the manner of his killing Mrs. Warren, his conduct and state of mind before, at the time of, and after the murder committed. N. B. This inquiry was made by the judges, and not by a jury.

Mass. S. J.  
Court, Essex,  
Nov. 1796,  
Common-  
wealth v.  
Blackbourn.

§ 2. In this case Henry Blackbourn was indicted for, and convicted of, the murder of George Wilkinson.

Facts were, August 14, 1795, in the evening, the deceased came to Blackbourn's about 8 o'clock, and spent the evening with Blackbourn and wife, and one Eunice Owers, she being called in at Wilkinson's request; they eat bread and cheese, and drank rum and water, brought by the deceased,

and passed the evening in good humour. About half after 9 o'clock Blackbourn asked Wilkinson to lend him about 9s.; this Wilkinson declined, saying he had no money about him, (though in his dying moments he said he had money, and lost it after he was wounded.) About half after 10 o'clock, Wilkinson and Eunice Owers got up to go away, and Blackbourn requested them, or told them they should stay longer. After some little time passed, they again offered to go; and he had fastened the door. [And Wilkinson told Dr. Little, in his last moments, that Blackbourn threatened to stab him if he went; but this threat he did not mention afterwards in his examination before two justices of the peace, when the deceased was on oath, and Blackbourn present, nor did said Eunice hear it.] On Wilkinson's persisting to go, the prisoner went to his desk, the other end of a long room, and took his sword, (sharp pointed and two edged,) and in returning towards Wilkinson, at the door, with the sword in one hand and the candle in the other, he, the prisoner, as said Eunice expressly swore, blew out the candle, and in a moment after Wilkinson fell; but the room being very dark, after the candle was out, and no moon, it did not appear how, or with what intent, the blow was given, which was found to be a stab with a sword, in the left side just below the ribs, of which he died in about twenty hours. Blackbourn was requested to light a candle, which for about fifteen minutes he declined; but finally went and brought one. The groans of Wilkinson, who was helped only by Eunice, waked Mrs. Parker and Miss Niel, in the room below; and they were informed Blackbourn had wounded Wilkinson; they urged Blackbourn to call help; he refused, and said he would run through the first person who should attempt to come into the room; but when he saw help would be called, he went for Dr. Little about 2 o'clock next morning, and told Little that he, Blackbourn, had wounded a man; and being asked why he did it, said, because he had treated him ill, and would not go out of his house. Little came, and found Wilkinson badly wounded and intoxicated. Blackbourn then told Little he had given the wound in play, not with any intent to hurt him; that Wilkinson had the sword, and he, Blackbourn, took it from him, and gave him a slight touch. About this time Mr. Archer asked Blackbourn how he did it; he said, with the sword, and then took it from behind his bureau, in the scabbard, broke it in two pieces, and the scabbard broke with it, and said it should never do any more mischief. Dr. Little, at this visit, asked Blackbourn if he had been drinking; he said, yes; though then he did not appear to be much in liquor. At this time all the persons present, among whom was said Eunice, appeared to Dr. Little to think it was done

CH. 215.

Art. 6.

As to death-bed declarations, admitted in this case, see Ch. 89, a. 2. s. 18, where true principles are stated; see also, Leach C. C. 566.—2 Hayw. 31.—1 East's P. C. 366, 367, 359, 360, must always be made under the apprehension of approaching death; whether so or not, the judge & not the jury, is to decide; & 15 Johns. R. 286. —See Ch. 89, a. 2, s. 15, 16.

CH. 215.  
Art. 6.



in play. Said Eunice swore further, that when Blackburn took the sword, before the mortal wound was given, she asked him what he was about to do with it ; he made no answer ; that she asked him again, and he said nothing ; that about 5 o'clock in the morning of the 15th of August, Blackburn said, that was the sword which gave the *mortal blow*, and it was broken that it should not do any more *murder*. Dr. Little understood Blackburn to say, that it should not do any more *mischief* ; and Eunice, in her testimony before the coroner, swore the expression was, that it should do no more *damage*. Eleven o'clock, August 15, Dr. Little visited the deceased again, and Blackburn came in with a bandage about his head, and some blood issued from beneath it ; they asked him what the matter was ; he said, Wilkinson had struck and wounded him. It was agreed by all that he had no wound there in the morning. Three o'clock, August 15, Wilkinson was moved to the poor-house, and recollected some hard words that passed between him and Blackburn ; such as, Blackburn said that Wilkinson should not be master of his house ; and Wilkinson conjectured that Blackburn wanted him to stay and spend more money. August 15, between 2 and 5 o'clock in the morning, Blackburn went to sleep ; and that morning he told Wilkinson he was sorry &c. Plea, not guilty. The defect in the indictment was amended by consent (value of the sword laid in shillings, amended so as to read in cents,) by the Attorney General.

Counsel, D. and A. were appointed by the court for the prisoner ; the evidence being clear that he killed Wilkinson, made but one question, if murder or manslaughter : stated from the books what was murder ; as also did the attorney general : cited 4 Bl. Com. 195, 198, 199 ; Haw. P. C. 80 ; Hale's P. C. 449, 450, 455, cases stated above : also, what is manslaughter, and cited Haw. P. C. 76 ; Hale's P. C. 466 ; 3 Bac. Abr. ; 3 Bl. Com. 183 ; 1 Hale's P. C. 456 ; and Lord Morley's case ; 290, 295 ; Kelyng, 135, Mawgridge's case,—51, Ford's case ; Foster C. L. 278, Nailor's case ; Style, 467. But the court stated, and so do many books, that if one man attack another with a deadly weapon, without provocation by assaults or blows, intending deliberately to do him some great bodily harm, and death ensues, it is murder ; for from the manner and weapon it shall be presumed he intended a felony, and from his doing the act without provocation the law supposes he did it designedly and from wickedness of heart, unless he shews the contrary. In this case the court allowed Dr. Little and others to testify what Wilkinson told them of the affair in his last moments, being first satisfied that he apprehended himself near his end ; though what he

told was not on oath, or the accused thereto cross-examined ; and though also his deposition on examination had afterward been taken on oath by two justices and Blackbourn present. The court said it has been usual to admit the declaration of the party killed, made by him when he thought himself dying. The said examination was also read, the said two justices having sworn in court that they took it &c.

CH. 215.  
Art. 6.

If one be a witness to a contract, and die before there is a trial on it, his declarations are inadmissible, unless made on oath or in *extremis* when he comes to a violent end.

7 Johns. R.  
96, 96, Gray  
v. Goodrich.

§ 3. In this case Cato Haskell was indicted for the murder of Charles Lewis, and convicted of manslaughter. The court appointed counsel to defend &c. It was a very nice question whether murder or manslaughter. The evidence came from near twenty persons, was minute, and of too great length to be stated in a work of this kind, and contradictory. If the widow of Lewis gave a true account, it was clearly a case of murder. If Cato's son stated the facts truly, it was clearly a case of manslaughter. Other witnesses differed from both. It is probable the jury gave most credit to Cato's son, about fifteen years old, who testified that he and his father soon after sundown, the night Lewis was killed, went to meet Lewis and his wife returning to Cato's house or hut, standing alone in the fields ; that near the house Cato and his son heard Lewis beating his wife, that Cato told him to leave off ; that Lewis said he would beat her for all the damned negroes in the world, (all were negroes except the son, who was a 'mulatto') and continued beating her ; that Cato parted them ; that soon after Lewis took up a stick and struck Cato four blows ; that the witness told Lewis he would not beat her so ; that Lewis then struck him and hurt him very much ; that Cato forbid Lewis to touch his son, and said if he did he would touch him ; that this was at the bars some rods from Cato's house, within about ten feet of which he suddenly killed Lewis with a scythe ; that near the bars Lewis laid down his bottle of rum and took Cato by the collar and gave him two blows on the side of his face ; that they got over the bars, and that then Cato struck Lewis twice with his cane ; that they continued quarrelling till they got near the door when Lewis again struck Cato twice ; that Cato unlocked the door and the son went in to kindle a fire, as he was told to do by his father ; that in two or three minutes, as he was about the fire, he heard Lewis' wife cry out, he is dead ; and heard Lewis cry out, I am dead, my dear. Lewis' wife denied there was any fighting or hard words before the death blow was given, and when given in a moonlight night she was about sixteen feet distant, drawing water, heard the blow immediately, saw Lewis on the ground

Mass. S. Jud.  
Court, Nov.  
Term, 1802,  
Common-  
wealth v.  
Cato Haskell.



CH. 215. and Cato by him looking on him. He soon fled ; and the son went off with him, but soon returned for his gun, when Lewis was dead. Son further testified the scythe used to hang on the corner of the house ; that the second time Lewis struck was not more than three or four minutes before the cry, he is dead ; son and his father went away &c. ; that Cato told people his name was Nathaniel Lamson ; that after some days they were arrived at Dartmouth College, where they were taken ; that he heard his father tell Lewis he should not have his clothes till he would be peaceable.

On the evidence two questions were made : 1. Is the boy's story true ? 2. If true, was the killing manslaughter ? The first question was argued very much at large on the evidence that the boy was to be believed, though directly contradicted by Dinah as to the main points of fighting and the previous provocations ; that she was not to be believed, for her story was unnatural in its material parts,—reasons &c.,—and many parts of her story contradicted by herself or by other witnesses &c., especially as to the material facts, the blows.

2d. Taking the boy's account as true, the killing was clearly manslaughter, for Cato had a legal provocation, and no time to cool before the fatal stroke was given, and that under a strong provocation like the present a deadly weapon makes no difference ; for the law, considering the provocation and making just allowances for the frailty of human nature, viewed the passions as roused, not by Cato, but a cause external to him, and his reason unseated, did not hold him accountable for his conduct or weapon, as was Taylor's case, who after pushed out of doors and left, instantly seized his sword, a deadly weapon, and gave the mortal wound. Authorities cited, Hale's P. C. 449, 450, 455, 456 ; 4 Bl. Com. 195, 198 to 201 ; Haw. P. C. 82, 115 ; Foster's C. L. 296, 259 ; 12 Co. 87 ; Cro. Jam. 296, Rowley's case ; 3 Bac. Abr. 667 ; Crown C. C. 499 ; Taylor's case, 5 Burr. 2794, who killed Smith ; Oneby's case, 2 Stra. 766 to 775 ; Mawgridge's case, Kelyng, 119. Thatcher J. was of opinion this killing was murder. Sewell J. held it manslaughter only. Sedgwick J. was of the same opinion. He seemed, however, to think that Cato telling the boy to make a fire &c. was evidence he had recovered his reason ; but then judge Sedgwick supposed further, that Lewis, considering the rum, his temper, fighting, &c. might give a new provocation after the boy went into the house, and which of course he could not see and thus renew the fighting. Judgment, to be branded with the letter B in the forehead, imprisoned one year, and after to find sureties in \$200, for his good behaviour three years, and stand committed till sen-

tence be performed. Dane and Jackson appointed by the court counsel for the deft. CH. 215.  
Art. 6.

§ 4. Under the act of March 15, 1805, making further provisions in the judicial department, one capitally indicted cannot be arraigned, (was for murder) unless three justices of the court be present. As to giving character in evidence, see Evidence. G. Blake for the deft. 2 Mass. R.  
808, Commonwealth v. Hardy.

§ 5. The defts. were indicted for the murder of Ebenezer Parker, two counts; separately tried because they did not agree to their challenges. Drew was first tried. Facts, Jan. 11, 1808, at Falmouth, Drew gave the deceased a mortal wound with a bludgeon by which his skull was fractured, was of hard wood four or five feet long, and about two inches in diameter. Parker died in seven days &c. He was, and long had been a deputy-sheriff; he had an execution against Quinby, and about fourteen days before, January 11, had lawfully arrested him on it and delivered him to one Richard King for safe keeping; that without Parker's knowledge, King at Quinby's request let him go at large, he promising to be ready to settle the execution whenever called on by Parker. Parker, who lived about seven miles from Quinby's, came there to settle about a week after; he could not be found. Drew and Quinby were hired men in the service of one Samuel Conant; Drew was a blacksmith, at work at Conant's forge, and Quinby worked at Conant's saw-mill; but when the mill was not going Quinby worked with Drew in the blacksmith's shop, at a distance from and not part of a dwelling-house. January 11, 1808, Parker again came to Quinby to arrest him if he would not settle the execution. Quinby knew this, left the saw-mill and went to Conant's house, and took a bottle of rum, passed out at the back-door, and went to the shop where Drew was making nails, when Drew and Quinby fastened the shop to exclude the entrance of any person. In the evening Parker having learnt that Quinby had shut himself up with Drew, sent one W. Babb jun. to the shop, to inform them that he was coming, and to advise Quinby to settle the execution. Babb went, and finding the door fastened, knocked; Quinby called, Who is there? Babb then told his name. Who is with you? asked Quinby. On Babb's answering, "no one," he was admitted into the shop, and the door was again fastened. Babb delivered his message from Parker, advised Quinby to settle the execution, and told him Conant was ready to settle for him if he would consent; but Quinby refused, and said it should not be settled that night. Parker then came to the shop with Richard King, Samuel Cox, and some others, to assist him,—knocked at the door: Drew was drawing nails from a rod then in his hands, and 4 Mass. R.  
391, 399,  
Commonwealth v. Drew & Quinby.

CH. 215. Quinby was blowing the bellows, one hand being on the bellows pole, and the other resting on the said bludgeon. When Art. 6. Parker knocked, Drew asked who was there. Parker answered, he was there. Drew threw some burning cinders towards the door, from the nail-rod in his hand. Parker asked for admission, and Drew asked him if he was well. "Yes," answered Parker; then I advise you, said Drew, to stay where you are; that Parker then told Drew, that he did not want him, that he wanted Quinby, who was his prisoner, and that he would have him. Parker then pulled the door open. Drew immediately threw down the nail-rod, caught up a sledge, and came to the door. He went out in a great passion, saying, What are you breaking open my shop for? Stand by, or I will throw the sledge through you. He then, with the sledge, struck at Parker, who had no weapon, and who dodged behind the door. Drew then struck at King, who retreated from the sledge, and Drew threw it at him, and it glanced against his breast, and fell without hurting him. When Drew so left the shop, Quinby threw down the bludgeon, he had held towards the door, and it fell about two feet from it. Drew returned to the shop-door, and reached in his hand, and took the bludgeon and turned to Parker, who had pushed the door partly forward, had come from behind it, and was standing against the edge of it, and Drew struck at him three times with the bludgeon, holding it in both hands, and striking with great violence. The first blow fell on the edge of the door, and forcibly shut it. The second blow was on Parker's head, and gave the mortal wound, and he fell. Third blow on his back and shoulders. Drew then, as one witness testified, knocked King down, and then carried the bludgeon into the shop, and told Babb he had better take care of Parker, for he had got enough of it. Babb left the shop for this purpose, and the defts. again fastened the door, and opened the window and defied the people on the outside;—Drew saying, as many might come as had a mind to, and he would give them all sore heads.

On this evidence the prisoner's counsel, Holmes and Emery, appointed by court, argued it was manslaughter he was guilty of, and not murder; that as Parker's servant had let Quinby go at large, he could not be again arrested on that execution, and therefore Parker was a trespasser in breaking open the shop door, and his entry might lawfully be resisted by Drew, who had possession of the shop. Agreed also that Parker was killed in attempting unlawfully to arrest Quinby by colour of a legal warrant;—that the attempt was an unlawful act; that not only Quinby, but any stranger might lawfully oppose the officer in his unlawful attempt, and *a fortiori* might Drew,

as he could not be considered as a stranger, being a fellow-servant with Quinby, working with him for Conant, who had hired them to labour in his service; and if the officer was killed in pursuing this unlawful attempt, the killing was at most but manslaughter. Cited and relied on Ferrer's case, Cro. El. 371; Hugget's case, 1 Hale, 465, and Kel. 59; *Rex v. Todley & al.* 2 Ld. Raym. 1296; Mary Adey's case, 1 Leach's C. C. 245; 1 East's C. L. 329, in the note.

CH. 215.  
Art. 6.

The Solicitor General, Davis, argued that when the mortal blow was given, Parker had given Drew no provocation sufficient in law to reduce the homicide below the crime of murder; and cited Foster's C. L. Disc. 2, c. 8, s. 10 to 14; 1 East's C. L. 325, c. 5, s. 89.

Court held the offence murder on the second count, but not on the first, for as to this, Quinby had been suffered to go at large voluntarily, by Parker's servant, hence Quinby could not be legally arrested again on the same execution. But the second count was for the murder of Parker in the peace of God, not alleging he was in the execution of his office. Held, "if the act of killing was in itself attended with probable dangerous consequences to the deceased, and was committed deliberately, the malice will be presumed, unless some sufficient excuse or provocation should be shewn; for the law infers that the natural or probable effects of any act deliberately done, were intended by the agent." The jury were directed to decide if the bludgeon was not a deadly weapon, "which would necessarily kill or do great bodily harm," if not, there was sufficient provocation to reduce the killing to manslaughter; but murder, if a deadly weapon. "That the provocation arising from the trespass committed by the deceased, in breaking open the shop door, for the purpose of unlawfully entering, was not a provocation sufficient to reduce the killing below the crime of murder, if the prisoner killed the deceased with a deadly weapon; because the trespass was not a sufficient excuse for such a barbarous act, admitting the prisoner, and not Conant, his master, to have possession of the shop. For it is a rule of law, that where the trespass is barely against the property of another, not against his dwelling-house, it is not a provocation sufficient to warrant the owner in using a deadly weapon; and if he do, and with it kill the trespasser, this will be murder, because it is an act of violence beyond the degree of provocation;" "but if the beating be with an instrument, and in a manner not likely to kill, and the trespasser should, notwithstanding, happen to be killed, it will be no more than manslaughter." As to the forcibly breaking the shop-door by Parker, in order unlawfully to arrest Quinby, the second provocation used, the court

CH. 215. said, "it was a principle of law, that if any man, under colour  
 Art. 6. or claim of legal authority, unlawfully arrest, or actually attempt or offer to arrest another, and if he resist, and in the resistance kill the aggressor, it will be manslaughter." And so as to any one "aiding the injured party by endeavouring to rescue him, or to prevent an unlawful arrest, when actually attempted." But *quære* as to a mere stranger. Court held, Drew was not a stranger to Quinby; but in this case, when Parker received his death wound, "he had not arrested Quinby, nor had he in fact attempted or offered to arrest him. This case was murder it seems on these grounds: 1. The officer had not even offered to arrest Quinby when the mortal wound was inflicted: 2. The prisoner used a deadly weapon. Quinby was found not guilty, on the ground the jury was not satisfied he threw the bludgeon to furnish Drew with a deadly weapon.

6 Mass. R.  
 134, 142,  
 Commonwealth v.  
 Thompson.

Samuel Thompson was indicted for the wilful murder of Ezra Lovett jun. by giving him a poison called *Lobelia*, January 9, 1809, of which he died the next day. Held, if one, assuming the character of a physician, through ignorance, administers medicine to his patient with an honest intention, and expectation of a cure, but which causes the death of the patient, he is not guilty of a felonious homicide.

7 Mass. R.  
 168, Commonwealth  
 v. Meriam.

William Meriam was indicted for the wilful murder of one David Bacon, by shooting him. Defence was insanity. The deft. was brought from the house of correction, where he had been committed as a person dangerous to be permitted to go at large; and being tried and acquitted of murder, he was by the court remanded to the house of correction.

See several special verdicts, and decisions thereon, of questions if murder or manslaughter in the Virginia cases, A. D. 1791 &c. in which cases sundry nice questions of this sort arose, pages 10 to 14, 116 to 119, 188 to 253, 253 to 262.

The cases in this chapter shew how fully the English law as to murder and manslaughter is adopted in Massachusetts; and generally these cases are law in every State in the Union, Louisiana excepted, where the law in regard to these crimes must be found in statutes lately enacted, or in French principles of law. The same remark applies fully to the next chapter. See minute forms in cases of murder &c., 2 Chit. C. L. 750, 751, &c.; Starkie, 373.

## CHAPTER CCXVI.

## PER INFORTUNIUM, SE DEFENDENDO.

ART. 1. *Per infortunium.*

§ 1. This, as before briefly stated, Ch. 212, is excusable homicide, and an offence altogether at common law, as far as it is any offence at all; and is where one is doing a lawful act, and death accidentally ensues. It is easy to see that there may be a multitude of cases in which the question may arise, if the killing were so or not. *Homicide, per infortunium*, or *chance-medley*, is excusable, or involuntary homicide, and is of two kinds: 1. When it is purely involuntary and casual; as killing a man *per infortunium*: 2. When it is partly involuntary and partly voluntary, but occasioned by a necessity which the law allows, which is commonly called homicide *ex necessitate*. In cases of involuntary homicide, the indictment-itself must find the special matter, or in case the indictment is for murder or manslaughter, and on the trial it appears to the jury to be involuntary, as by misfortune, or self-defence, the jury ought to find the special matter, and so conclude *et sic per infortunium*, or *se defendendo*, because the court must judge on the special matter, whether it be murder, manslaughter, homicide, or *per infortunium*, or *se defendendo*, and the jury is only to find the fact, and leave the judgment thereon to the court; and in such case the prisoner must not plead the special matter, so justify, but must plead not guilty, and the special matter must be found by the jury; for on the special matter found the court may give judgment against the conclusion of the verdict, as that the fact is manslaughter, though the conclusion of the verdict be *per infortunium*, or *se defendendo*.

§ 2. Homicide *per infortunium* is where a man is doing a lawful act, and without intention of bodily harm to any one, and by accident another's death ensues; as if a man be shooting at butts or pricks, and by casualty his hand shakes, and the arrow kills a by-stander.

§ 3. It is not sufficient that the act upon which death ensues be lawful, or innocent, it must be done in a proper manner and with due caution to prevent mischief. Parents, masters, and other persons having authority *in foro domestico*, may give reasonable correction to those under their care, and if death ensues without their fault, it will be no more than acci-

Hal. P. C.  
471, 473, 474.  
—East's C. L.  
260, &c.—1  
Hawk. ch.  
29, s. 6.

3 Wils. 407.—  
1 Hal. P. C.  
472 —East's  
C. L. 260,  
261.

Fos. C. L.  
262, 263 —  
East, 260,  
261, 263.

## CH. 216.

## Art. 1.

East's C. L.  
262, 263, &c.  
—2 Haw. ch.  
29, s. 4.—4  
Bl. Com. 192.

dental death, or *per infortunium*; but otherwise if immoderate, as to the manner or the instrument, as stated above. All ought to have due caution, as workmen, and others. Workmen throw stones, rubbish, or other things, from a house, in the ordinary course of their business, by which a person underneath happens to be killed, if they look out, and give timely warning to those below, beforehand, it will be accidental death; but if without such caution, it will be manslaughter at least. It was a lawful act, but done in an improper manner. But these cases have their exceptions. Therefore Kelyng very properly says, that if this be done in the streets of London, or other populous towns, it will be manslaughter, though the caution be given, that is above mentioned. But this exception also has its limitations; as if this be done in those thick settled places early in the morning, when few or no people are stirring, and the ordinary caution is used, then death that may ensue is *per infortunium*. But even this warning will not do when the streets are full of people, for in the hurry and noise of a crowded street few people hear the warning or sufficiently attend to it.

Foster's C. L.  
263; cites 1  
Hale, 476.—  
East's C. L.  
263.

§ 4. If a person driving a cart, or other carriage, happeneth to kill; if he saw or had any timely notice of the mischief likely to ensue, and yet drove on, it will be murder; for it is wilfully and deliberately done; here is the heart regardless of social duty, already described. If he might have seen the danger, but did not look before him, it will be *manslaughter*, for want of due circumspection. But if the accident happened in such a manner that no want of due care could be imputed to the driver, it will be *accidental* death, and the driver will be excused; as where a child suddenly, and out of the driver's view, runs under a wheel and is killed.

Haw. P. C.  
74 to 76.—  
East's C. L.  
264, &c.

§ 5. So if a man whip a horse on which another is riding, whereon the horse starts, and runs over a child and kills it, the rider is guilty of homicide *per infortunium*, the other of manslaughter. So where a man happens to kill another by a piece of timber flung down from a house, standing out of the road, after loud warning to all persons to stand clear; or by a gun discharged at wild fowl; or by an unlucky fall or kick at wrestling, or foot-ball, or other such sports, or by moderate correction of a child, &c; in any of these cases if death ensue it will be *per infortunium*, due care being always taken. But the party charged in these cases must plead not guilty, and give the special matter in evidence.

1 Hal. P. C.  
472.—3 Wils.  
407, 408.

§ 6. If a man be felling a tree in his own ground, and it falls and kills a person, it is *chance-medley* or *per infortunium*. But in all these cases if it doth only hurt a man by such an accident, it is nevertheless a trespass, and the person hurt shall

recover his damages ; for though the chance excuses from felony, yet it excuses not from trespass ; a damage is sustained, and one or the other must bear it. CH. 216.  
Art. 1.

§ 7. Several persons come to commit a trespass in the house of A, and he shoots and kills one, this is manslaughter; but otherwise, had it been if they had entered to commit a felony. 1 Hale P. C.  
474.

§ 8. This case was William Levet being in bed and asleep in the night in his house, his servant hired Frances Freeman, to help her do her work, and about midnight the servant going to let her out, thought she heard thieves breaking open the door ; she ran speedily to her master and informed him of this breaking &c. ; he rose suddenly, and took his rapier, and ran down suddenly. Frances hid herself in the buttery, lest she should be discovered. Levet's wife spying her there, and not knowing her, cried out, *Here they be that would undo us.* Levet ran into the buttery, *in the dark*, not knowing Frances, but thinking her to be a thief, and thrusting with his rapier before him, hit Frances in the breast mortally, whereof she instantly died. Held, on the whole, this was *per infortunium*. Remarks, East's C. L. 274, 275. Foster, 299.—  
Levet's case,  
Cro. Car.  
538.—East's  
C. L. 274.

§ 9. Much depends on the act done if lawful or not. Therefore, if A shoot at a deer in his own park, and the arrow glancing against a tree, hits and kills a man who is standing by, this is *per infortunium* ; because it was lawful for him to shoot in his own park. But if A, without the license of B, hunts in his park, and his arrow so glancing by a tree, kills a bystander, to whom A meant no injury, it is manslaughter ; because the act was unlawful. So if A throw a stone at a bird, and it strikes and kills another, to whom he meant no injury, it is *per infortunium*. But if he had thrown a stone to kill the poultry or cattle of B, and the stone hits and kills a bystander, it is manslaughter, because the act was unlawful ; but not murder, because he did it not maliciously, or with intent to hurt the bystander ; also, (other books,) nor with an intent to commit a felony. 1 Hal. P. C.  
475.

§ 10. As to caution, the law does not require the utmost caution. It is sufficient there be a reasonable precaution ; what is usual and ordinary, in such cases, is required. Fos. C. L.  
265.—East's  
C. L. 267.

§ 11. A man and his wife, on a Sunday morning, went a mile or two to a friend's house, with some neighbours, to dine. He carried his gun with him, hoping to find some game on the way, but before he dined he discharged his gun, and put it in a private place in his friend's house. After dinner he went to church, and in the evening returned home with his wife and neighbours, bringing his gun with him, which was carried into the room where his wife was, she having brought Fos. 265.—  
East's C. L.  
267, 268.



CH. 216. it part of the way ; he took it up and touched the trigger, and  
 Art. 1. the gun went off and killed his wife, whom he dearly loved.

It came out in evidence, that while the man was at church, a person belonging to the family privately took the gun, charged it, and went after some game, but before the service at church was ended returned it loaded to the place whence he took it, and where the deft., who was ignorant of all that had passed, found it, to all appearance, as he left it. Held, he had reasonable grounds to believe that his gun was not loaded ; and so the killing his wife was *per infortunium* ; and he was acquitted.

1 Hal. P. C.  
480.

§ 12. A assaults B, who flies to the wall, or falls, holding his sword, knife, or pike, in his hand ; A runs violently, or falls upon it, without any thrust, or stroke, offered at him by B, and thereon A dies ; this is death *per infortunium*. Our homicide *per infortunium*, answers nearly to the French *involuntary* homicide. Penal Code, art. 319. The latter is attended with some negligence or inattention, and punished with imprisonment between three months and two years, and a fine from 50 to 600 francs.

East's C. L.  
264.—1 Hale,  
429.—1 Haw.  
ch. 31, s. 62.  
—1 Johns. R.  
513, Sheldon  
v. Clarke.

§ 13. *Medicine—bad administering.* If one, no regular physician or surgeon, administer medicine, or perform an operation, which, contrary to expectation, kills the patient, was manslaughter formerly, now misadventure, according to the better opinion. But if one give physic to another, in sport, of which he dies, it will be manslaughter ; and if given to procure an abortion, and the woman dies, it is murder. Liable to a penalty for practising against law.

East, 268,  
269.—Fost.  
260.—East,  
270.

§ 14. If men engage in lawful sport, as playing by consent at cudgels, or foils, or wrestling, and death ensues, it is by misadventure, if due caution be used ; if not, manslaughter ; but not murder, because the intent is not malicious. *Secus* as to unlawful sports, as prize-fighting, public boxing, &c. for the sake of lucre.

East's C. L.  
331, Huggins'  
case.—2  
Stra. 882.—  
Fost. 322.

§ 15. *Killing by gaolers &c., by duress of imprisonment.* As where one Barnes, a servant of the gaoler, put Arne, a prisoner, into a new built room, over the common sewer, the walls damp and unwholesome, and kept him without fire, chamberpot, or other necessities, for forty-four days, at the expiration of which he died. Held, Barnes was guilty of murder ; but that the gaoler was not, who appointed one Gibbon his deputy, and he appointed Barnes. The gaoler once saw Arne in his wretched situation. So a gaoler was adjudged guilty of murder who knowingly confined A in a room with B, having the small-pox, and A took it and died.

ART. 2. *Se defendendo*.

CH. 216.

Art. 2.

§ 1. This, as observed briefly Ch. 212, is excusable homicide. It includes manslaughter *ex necessitate*. This necessity makes the homicide not simply voluntary, but mixed, partly voluntary and partly involuntary; and homicide *se defendendo* is of two kinds: 1. That necessity which is of a private nature: 2. That necessity which relates to the public justice and safety. The former is that necessity which obligeth a man to his own defence and safeguard. Hence we must inquire what a man can legally do for the safeguard of his own life: 2. What for the safeguard of the life of another: 3. What may be done for the safeguard of a man's goods: 4. What may be done for the safeguard of a man's house or habitation.

1 Hale's P.  
C. 478, 481.  
—East's C.  
L. 271, 272.  
—4 Bl. Com.  
180.—1 Haw.  
c. 28, s. 23.—  
Kel. 132.

§ 2. First, Defence of one's own life, usually called *se defendendo*. And here, generally, says Hale, if one be indicted of felony, he cannot justify as that he did it in his own defence, or *per infortunium*, but may plead *not guilty*, and upon his trial the special matter is to be found by the jury, and thereon the court gives judgment.

1 Hale's P.  
C. 448, 479.  
Cro. Car. 644.  
—Fost. 274.  
—1 Hale,  
484.

§ 3. Homicide *se defendendo* is of two kinds: 1. Such as, though it excuseth from death, yet it excuseth not the forfeiture of goods, (in England,) nor is the party to be absolutely discharged out of prison, but bailed, and to purchase his pardon of course: 2. Such as wholly acquits him of all kinds of forfeiture. First, Homicide *se defendendo* is the killing of another person in the necessary defence of himself against him that assaults him; and in this case these things must be observed: 1. It is not necessary that the party killed be the first aggressor or assailant, or of his party, though commonly it holds. There is malice between A and B, they meet casually, A assaults B, and drives him to the wall; B in his own defence kills A, this is *se defendendo*, and shall not be heightened by the former malice into murder or homicide at large; for it was not a killing on account of the former malice, but upon a necessity imposed upon him by the assault of A. A being assaulted by B, returns the blow, and a fight ensues. A, before a mortal wound is given, declines any further conflict, and retreats as far as he can with safety, and then in his own defence kills B, this is excusable self-defence; but if the mortal stroke had been given first, it would have been manslaughter. All malice apart, it is not material who gives the first blow, in this case of excusable self-defence, if either party quits the combat, and retreats before the mortal stroke is given; but if the first assault be made upon malice, which must be collected from the circumstances, and the assailant to give himself some colour for putting in execution the wicked

1 Hale, 479,  
487, Cop-  
ston's case.—  
East's C. L.  
283, 284.—  
4 Bl. Com.  
185.

Foster, 277.

CH. 216. purposes of his heart, retreats, and then turns and kills, this  
 Art. 2. will be murder. Another circumstance necessary to be proved  
 in a plea of self-defence is, that the fact was done from mere  
 necessity, and to avoid immediate death; East, 292; as in  
 Nailor's case.

Nailor's case,  
 East's C. L.  
 277, 286, 286.

Nailor was indicted for the murder of his brother. The case was that before stated, in which the court held there was not sufficient necessity for killing the assailant, and said, no assault, however violent, will justify a killing the assailant, under the plea of necessity. To justify killing one to prevent his committing a felony, it must plainly appear he meant to commit one, and to save life it must appear it is in danger. Hence not enough one attempts to pick a pocket. East, 272, 273, 277.

Foster's C.  
 L. 273, 274,  
 299—East's  
 C. L. 271.—1  
 Hale, 466,  
 484.—East,  
 273.

§ 4. In justifiable self-defence, as Foster calls it, or according to some others, justifiable homicide, the injured party may repel force by force in defence of his person, habitation, or property, against one who manifestly intends and endeavours by violence or surprise, to commit a known felony upon either. In these cases he is not obliged to retreat, but may pursue his adversary till he finds himself out of danger, and if in a conflict between them, he happens to kill, such killing is justifiable. The right of self-defence in these cases is founded in the law of nature, and is not, and cannot be, superseded by the law of society. For before civil society was formed, (one may conceive of such a state of things, though it is difficult to fix the period when it was formed,) the right of self-defence resided in individuals. It could not reside elsewhere. And since, in cases of necessity, individuals incorporated into society, cannot resort for protection to the laws of society, that law, with great propriety and strict justice, considers them as still, *in that instance*, under the protection of the law of nature. As where a known felony is attempted upon the person to rob or murder; here the party assaulted may repel force by force; and his servant or any other person may interpose to prevent the mischief; and if death ensue, the party interposing is justified. In this case nature and social duty co-operate. A felony must be intended, and to justify killing on the ground of necessity, the party killing must be wholly without fault. East's C. L. 277, 279, several cases; and 1 Hawk. c. 28, s. 22; and Basset's case, 1 Hale, 440, 453; Kel. 58; and Mawgridge's case, Ch. 197, a. 7, s. 5. So if one assault a woman to commit a rape upon her, she may lawfully, in defence of her chastity, kill this assaulter. The injury intended never can be repaired or forgotten; "and nature, to render the sex amiable," implants in the female breast a high sense of honour, a just sense of virtue

Foster's C.  
 L. 274, 299.  
 —East's C.  
 L. 272, 273.

and a keen sense of injury, in this respect. In this case the law of nature, of self-defence, and the laws of society, all coincide to protect her, by allowing her or any others present to kill the felonious assaulter. Must be reason, to believe a felony is intended. Art. 1, s. 8. CH. 216.  
Art. 2.

§ 5. So even a lodger in a house may kill one attempting to break it, to commit a crime in it. As in this case Cooper was indicted for murder, and plea not guilty. Cooper lodged in the house of one Anne Carricke, who kept a tavern; the deceased about midnight assaulted the house, and attempted to break in to slit her nose, as he swore he would, because she kept a bawdy house. Cooper dissuaded him &c.; but he said he would enter and cut Cooper's throat. He broke one window and thrust in his rapier against Cooper, who in defence of the house and himself, thrust the deceased in the eye, and killed him. Held, justifiable homicide by 24 Hen. VIII. made in confirmation of the common law. So may any one in the house, even a sojourner, kill the assailant who makes the assault, and intends mischief to any in it. And Cooper was discharged. So a stranger may interfere to prevent a felony. 1 Hale, 470.  
Cro. Car. 544,  
Cooper's  
case.—East's  
C. L. 271 &c.  
289.—Foster,  
274—2  
Hawk. c. 12.  
s. 19.—1  
Hale, 484,  
485.—Kel.  
136.

§ 6. The ancient legal notion of *chance-medley*, or *chaud-medley*, was when death ensued from a combat between the parties upon a sudden quarrel. Though the common notion now is death accidentally produced. Foster, 276.

§ 7. In homicide *se defendendo*, some act to be done by the party killing, seems to be necessary; for if he be merely passive, the killing will be only *per infortunium*. 1 Hale's P.  
C. 480.

§ 8. Regularly it is necessary for a person killing another, *se defendendo*, to fly as far as he may to avoid the violence of the assault, before he turns upon his assailant. But this rule has some exceptions. As where a gaoler or officer is assaulted in the execution of his office, he is not bound to give back to the wall; but if he kills the assailant, it is *se defendendo*, though he do not give back to the wall;—so as to a constable or watchmen, for they are ministers of justice, and under a more special protection in the execution of their office, than private persons. But it cannot be *se defendendo*, when no assault is made by the prisoner, and the officer kills him; but it is murder if not necessary to prevent his escape. 1 Hale's P.  
C. 481.—  
East's C. L.  
295 &c.

§ 9. And there is a material difference between civil actions and felonies. If a man be in danger of arrest by a *capias* for debt or trespass, and he flies, and the officer kills him, it is murder; but if a felon flies, and he cannot be otherwise taken, and he is killed, it is no felony, and the officer so killing, forfeits nothing. 1 Hale's P.  
C. 481; see  
Arrests.

§ 10. Again, if a thief assaults a true man in his house or

CH. 216. abroad to rob or kill him, this man is not bound to give back  
*Art. 2.* to the wall, but may kill the assailant, and it is no felony. 1  
 Hale's P. C. 481 ; cites Co. P. C. 56.

§ 11. Again, if A assaults B so fiercely, that B cannot save  
 his life, if he gives back, or if in the assault B falls to the  
 ground, whereby he cannot fly, in such case if B kills A it is  
*se defendendo*.

§ 12. There are cases in which the *first* assaulter may kill,  
*se defendendo*, as above, where his assault is sudden, and not  
 on any previous malice ; as where A suddenly assaults B, and  
 then B re-assaults A, and A *bonâ fide* flies to avoid B's as-  
 sault, who pursues A, and then A being driven to the wall,  
 turns and kills B, this is *se defendendo*, for it appears in fact,  
 A fled as far as he could from the assault of B. But accord-  
 ing to Hale, if A assaults B first, and on that assault B re-  
 assaults A, and so fiercely that A cannot retreat to the wall or  
 other *non ultra*, without danger of his life ; nay, though A  
 fall upon the ground on B's assault, and then kills B, this is  
 not *se defendendo*, but murder or manslaughter, according to  
 circumstances ; as otherwise, all murders or manslaughters  
 would be turned into *se defendendo* ; and the reason given is,  
 because his fall not being voluntary, as his flight is, it does not  
 appear that he declined fighting, so that the party first as-  
 saulted cannot safely quit the advantage he has got.

§ 13. A and B were walking together in Fleet street, and  
 B gave A some provoking language,—then A gave B a box  
 on the ear,—they closed, and B's arm was broken on being  
 thrown down ; he ran to the house of his brother presently,  
 near by ; C took the alarm, came out with his sword drawn,  
 and made towards A,—he retreated ten or twelve yards ; C  
 pursued him ; A drew his sword, made a pass at C, and killed  
 him. Held, this was not *se defendendo*, but manslaughter ;—not  
 murder, on account of the sudden falling out ; but manslaughter,  
 partly because A made the first breach of the peace, by  
 striking B, and it appeared that A might have retreated out  
 of danger, and his stepping back was rather to have an oppor-  
 tunity to draw his sword with more advantage to come on C,  
 than to avoid him ; and the flight, to gain the advantage of  
*se defendendo* to him who kills, must not be a feigned flight,  
 or a flight to gain the advantage of breath, or opportunity to  
 fall on afresh, but it must be a flight from the danger, as far  
 as the party can, by reason of some wall, ditch, company, or  
 the fierceness of the assailant will permit.

§ 14. *Se defendendo in defence of masters, wives, &c.* A  
 assaults the master, he flies as far as he can to avoid death,  
 the servant kills A in defence of his master, this is homicide,  
*se defendendo* of the master. The same law holds if the mas-

1 Hale's P. C.  
 482 ; cites  
 Co. P. C. 56.  
 —East, 281.

1 Hale's P.  
 C. 482.—  
 East's C. L.  
 278, 279,  
 282, n.

3 Bac. Abr.  
 678 ; cited  
 from Hale's  
 P. C. 483.—  
 East, 292.

1 Hale's P. C.  
 484.—East's  
 C. L. 292, &c.

ter kills in defence of his servant ; the husband in defence of his wife, and the wife in defence of the husband ; the child of the parent, and the parent of the child ; for the act of the assistant shall have the same construction in such cases as the act of the party assisted should have had, if it had been done by himself, for they are in a mutual relation one to another.

CH. 216.  
Art. 2.

§ 15. If A be travelling and B come to rob him, if C falls into the company, he may kill B in defence of A,—much more if B come to kill A, and such his intention is apparent, for in such case of a felony attempted as well of a felony committed, every man is thus far an officer that at least his killing of the attempter in case of necessity puts him in the condition of *se defendendo* in defending his neighbour. So if A attempt to ravish B, her husband or father may kill A to prevent the crime, if not otherwise to be prevented, and it is *se defendendo* ; but not *se defendendo*, but manslaughter, if the crime attempted might be otherwise prevented ; therefore, circumstances must guide in such cases. But all interference of a third person must be solely to preserve the peace.

1 Hale's P. C.  
484, 485.—  
East's C. L.  
290, 292.

§ 16. *Se defendendo in killing in defence of goods or house of one.* In these cases there is a material difference between a trespassing act and a felonious act, and between felonious acts themselves. If A pretend a title to the goods of B and take them away from B as a trespasser, B may justify beating A ; but if he beat him so that he dies, it is not *se defendendo*, but manslaughter. So as to one's house, if no danger of life.

Foster, 273.  
—4 Bl. Com.  
180 —1  
Hale, 445,  
481, 488.—  
East's C. L.  
271.—1  
Hale's P. C.  
485, 486.—  
East's C. L.  
287.—Cro.  
Car. 537.

§ 17. Harcourt was in possession of a house by title, A attempted to enter, and shot an arrow at those in the house, and Harcourt from within shot an arrow at those who would have entered, and killed one of them ; this was deemed not *se defendendo*, but manslaughter, because there was no danger of his life from those without. But if A had entered into the house and Harcourt had gently laid his hand upon him to turn him out, and then A had turned upon him and assaulted him, and Harcourt had killed him, it had been *se defendendo* ; and so it had been if A had entered upon him and assaulted him first, though he intended not to kill him, yet if Harcourt had thereupon killed A, it had been *se defendendo*, and not manslaughter, though A's entry was not with an intent to murder Harcourt, but only as a trespasser to gain possession. And Hale thought that Harcourt being in his own house need not fly or give back, as he had the protection of it to excuse him from flying, for that would be to give up the possession of his house to his adversary by his flight. This is a very common case, the assailant first attempts to get possession of property illegally, the possessor gently resists, on this the assailant assaults him and offers violence to his person ; this totally

Harcourt's  
case, East's  
C. L. 267,  
288.

CH. 216. changes the scene, for the one thus assaulted is compelled to defend his person also; *secus*, if the attack continue on the property only. And Cook was guilty of manslaughter (but not murder) because he might have resisted the officer's unlawful entry into his, Cook's, house, without killing him, and because Cook voluntarily shot the officer, so not like Levet's case.

Art. 3.

And Cook's case, Cro. Car. 537.

1 Hale's P. C. 445, 486, 489.  
—1 Hawk. ch. 28, s. 23.  
—East's C. L. 287, 288.

§ 18. There is a difference between a trespass and felony. Hence, if the husband finds A in the act of adultery with his wife and kills him, it is manslaughter; but if A attempt to ravish her, and she or her husband kill A, it is *se defendendo*, for a felony is attempted. So if one as a trespasser comes to take my goods, I may beat in defence of them, but if I kill him it is manslaughter, (meaning if he do not assault my person;) but if he come to steal my goods, and in resisting his attempt I kill him, this is *se defendendo*, for in this he attempts a felony,—and no forfeiture by our common law. So if A attempt burglary or arson in my house, and I, my servant, "or any within my house," shoot him and kill him, it is no felony, but *se defendendo*, for A attempts a felony, and I may assemble persons for the safeguard of my house; and it is always but *se defendendo*, and no felony or forfeiture to kill a felon who flies or escapes, if he cannot be otherwise taken, but if he can be, then it is manslaughter to kill him at least. And if indicted the plea is not guilty, in *se defendendo*, and the deft. shall be entirely acquitted on the special matter found by the jury; also in such cases the jury must inquire if the killing be of necessity or not. And in such case the law makes every person an officer to arrest a felon, even without warrant from any particular court or magistrate. If A in defence of his house kill B attempting as a trespasser, it is manslaughter at least, if no danger of A's life; but if B had entered A's house, and A had gently laid his hands on him to turn him out, and B turns and assaults him, and A kills B, not otherwise able to avoid the assault or to retain lawful possession, this is *se defendendo*, or self-defence; so if B had entered and assaulted first.

East, 287, 288,

ART. 3. *Ex necessitate killing &c.*

§ 1. There are many cases in which life is taken away of necessity; and where the killing is of necessity it is justifiable. Many cases to this purpose have been already stated; as to prevent the commission of felonies, in divers cases not to be prevented but by killing the felonious aggressor; so to preserve life or female chastity, not to be preserved but by killing him. In this article a few more cases will be collected.

1 Hale's P. C. 489, 490.

§ 2. If a felon be arrested, and in carrying him to gaol he breaks away, and the people of the town or vill pursue him and cannot take him unless they kill him, those who kill him

upon their arraignment shall be acquitted of the felony ; for this killing is of necessity. CH. 216.  
Art. 3.

§ 3. The sheriff cannot justify as of necessity killing one who barely flies from him in civil process ; but if the sheriff or officer be resisted by one whom he attempts lawfully to arrest in a civil action, or to retake after he has arrested him, unavoidably kills him in the affray, he may justify it as done of necessity, though the officer never gave back, but stood his ground and attacked the party. 8 Bac. Abr.  
674.—East's  
C. L. 294.

§ 4. A man shall never justify himself under a necessity which he brought upon himself by his own fault. And, therefore, if rioters wrongfully detaining a house by force, kill the party ejected or any of his assistants who attack it from without, and endeavour to burn it, they are guilty of manslaughter. Haw. P. C.  
675 ; cited 3  
Bac. Abr.  
675.

§ 5. Summary of the cases in which a man may kill in self-defence : 1. If a thief attempt to rob him : 2. Him that attempts to rob or kill him in or near the highway : 3. Him who attempts wilfully to fire his house or to commit burglary, though he hath not actually broken or fired the house, if he came with that purpose : 4. So an officer may lawfully in the execution of his office kill a person that assaults him, though the officer give not back to the wall : 5. So as to the constable or watchman that commands the peace and is resisted.

§ 6. So one may lawfully kill a felon who resists ; and the like of a constable or watchman that is charged to take one accused of felony, if he resists or flies and cannot be otherwise taken, though perchance he be innocent.

§ 7. If the prisoners in gaol assault the gaoler, he in his defence may lawfully kill any of them.

§ 8. If the assailant attempt to commit forcibly any felony upon a man's person or property, especially his habitation, he may lawfully kill the assailant to prevent the felony, and without giving back ; wherever giving back would afford him an opportunity to enter on the commission of his intended crime and get possession.\*

§ 9. To reduce the offence from manslaughter to self-defence upon *chance-medley*, he must first shew " that before a mortal stroke given he had declined any further combat, and had retreated as far as he could with safety : 2. That he then East's C. L.  
280, 281.—  
Foster, 277.  
—4 Bl. Com.  
180, 184.

\* Here the French Penal Code, arts. 327, 329, merits attention as being concise, but very imperfect compared with our common law. This code enacts, " no crime or offence is committed when death, wounds, or blows are inflicted in compliance with the law, and by command of the lawful authority." " It is no crime or offence to kill, wound, or strike, when compelled by actual necessity in self-defence, or in defence of others." But this defence is limited to " repelling during the night, the scaling or breaking of enclosures, walls, doors, or windows of an inhabited house or apartment, or their dependencies ;" and to defence " against the perpetrators of robberies or depredations committed *vi et armis*." It will be observed, our common law wisely makes self-defence and defence of others, justifiable in many other cases, and its main fault is in its being to be found but in various books, and scattered cases, not always uniformly decided.



CH. 216. killed his adversary through mere necessity, in order to avoid immediate death." So seems to be Blackstone's distinction, and so Foster's. As in Naylor's case, above, nothing appeared to shew that the deceased aimed at the prisoner's life, and so ruled manslaughter; also, he used a dangerous weapon, and hence presumed he meant to kill. But if the deceased do not put the slayer's life in danger but continue to beat him, he may lawfully exert so much force as is necessary to compel him to desist. And this is a rule in many cases. As if one persist in taking away my child or my property, I may use force to make him desist, but I must increase my force no more or faster than the case or his force requires; and in no case can I aim at his life but to save my own, or to prevent his committing a felony or doing me some great bodily harm. And Harcourt's case, above, and Cook's case. But I cannot justify killing one when he barely commits a trespass against my property, nor my using a deadly weapon. As if I see A breaking my fence and I take up a hedge stake and kill him, this is murder; because an act of violence much beyond the proportion of the provocation, and the more so after he desists; but if with an instrument not likely to kill, only manslaughter, and I may by degrees use such force as will make him desist if clearly a trespasser.

East's C. L. 292.

§ 10. *Two combat, a third interferes.* A and B fight on malice, and C, the friend or servant of A, not acquainted therewith, comes in and takes part against B and kills him; this is murder in A, but manslaughter in C, but had been murder in C also, if he had known the malice. But if A had been assaulted and had retreated as far as he could, and then C had killed B, it had been *se defendendo*. But if the servant had killed B before A, the master, retreated as far as he could, it would have been manslaughter in the servant C; and the law is the same if the master kill the other in defence of the servant. But if there be only angry words between A and B, and C, A's friend, strike B with a bowl or other dangerous instrument and kill him, this would be murder.

Cro. Jam. 296.—1 Hale 484.—Kel. 18, 136.

Kel. 66.—1 Haw ch. 31, s. 51.—East. C. L. 304, 305.

§ 11. So if A and B be fighting, and C interferes, with intent to part them, but do not signify such intent, and he is killed by one of them, this is manslaughter; as the one killing C might think he came to aid the other, unless he had given some notice of his real intention. And this holds even in the case of a peace officer. Peace officers taking opposite parts &c.

East, 295.—Fost. 270; 303.

§ 12. *Officers of justice protected against resistance.* It is a general rule, that where persons authorized to arrest or imprison, or to execute public justice, and using the proper means, are resisted in so doing, and the party resisting is kil-

led in the struggle, such homicide is justifiable; and if the officer be killed, it will be murder in all who take a part in such resistance. But if he who attempts to arrest has no authority, is killed by the accused, it is but manslaughter. As where a sergeant arrested one Withers, a soldier, and he, in the struggle, killed the sergeant, who acted under the articles of war; held but manslaughter, because he did not produce them to the court, so no authority appeared.

CH. 216.  
Art. 3.

If A begin a riot or affray, and continue in it till the constable is killed, he is a principal murderer, though he do not commit the fact. And officers are protected *eundo, morando, at redeundo*, when doing their duty. Nor need an officer retreat at all, but he can come to extremities but on reasonable necessity, in order to execute his office; and his punishment must never exceed the necessity of the case. And if no resistance at all be made, and he kills, it is murder. So if after the resistance is over, it is manslaughter at least; and if done in cool blood, murder.

Salk. 335,  
Regina v.  
Wallis & al.  
—East's C. L.  
316—2 Hale,  
84.—East's  
C. L. 298, 300.

§ 13. Officers' assistants, (and all are bound to aid in preserving the peace,) commanded or not, are under the same protection as the ordinary ministers of justice are; so are even private persons, who interpose to put an end to an affray, or who endeavour to bring felons, or such as have given dangerous wounds, to justice. As to arrests, see Arrests, Ch. 172, a. 9; Ch. 65, a. 2, a. 3, many cases; and Samuel v. Payne & al., Ch. 75, a. 6, s. 4; and Hamilton v. Willan, Ch. 75.

East's C. L.  
297, 298.—1  
Hale, 480.—  
2 Hale 75.

§ 14. In sudden affrays, private persons interposing to part the combatants, or to prevent mischief, must give express notice of their friendly intentions, after which, if assaulted by either combatant, and kill him in the struggle, this is justifiable homicide; but if the party so interposing, with such notice, be killed by either affrayer, it is murder in him, but not in the other combatant, unless he had also struck him.

East's C. L.  
304.—Fost.  
272, 311.

See Hugett's case, Ch. 197, a. 7, s. 10, among the cases in which third persons may interpose to relieve one illegally restrained of his liberty.

§ 15. *Se defendendo against a trespasser.* If A be in the lawful possession of his house, and B attempts, as a mere trespasser, to enter and gain possession, A cannot kill him in self-defence; but may, if B resists, after A gently lays his hands on him to turn him out, not able otherwise to keep his possession; so if B enter on him and assault first, though he enters not to commit a felony, but only as a trespasser, to gain possession, A being in his own house need not fly as far as he can, as he has the protection of his house, and as flying would be to give up the possession. And if A be killed, it is murder,

CH. 216. in turning out those having no right to remain. As where  
 Art. 3. two soldiers, at 11 o'clock at night, came to A's inn and demanded beer, this he refused, on account of the late hour, and advised them to go to their quarters; they went away uttering imprecations. In ninety minutes they returned, when the door was open to let out some company who had been detained there on business; one of the soldiers rushed in, and renewed his demand for beer; A returned the same answer, and on the soldier's refusing to go out, and persisting to have some beer, offering to lay hold of A, he at the same time collared him, one pushing and the other pulling towards the outer door, where, when A came, he received a violent blow on the head with some sharp instrument, from the other soldier, who remained out at the door, which occasioned A's death in a few days. Held, murder in both soldiers, notwithstanding this previous struggle; for A did no more in attempting to put the soldier out of his house, at that time of night, and after the warning he had given him, than he lawfully might, which was no provocation for the cruel revenge taken; especially as there was reasonable evidence of the prisoners' having come the second time with a deliberate intention to use personal violence in case their demand for beer was not complied with; this circumstance, they meant to carry their point or use personal violence, was very material, as it drove the landlord, A, to guard the defence of *his person*, and not solely the defence of his property.

Rex v. Wilmoughby,  
 East's C. L.  
 287, 288,  
 A. D. 1791.

East's C. L.  
 236, 289.—  
 Foster, 291.  
 —1 Hale, 478.  
 —Kel. 132.

A finds B a trespasser on his land, and suddenly beats him and kills him, but beats him not with an intent to injure him materially, but merely to chastise him for the trespass, and to deter him from repeating the like; this is manslaughter; for if A had killed him with a bill or hedge stake, or beat him outrageously with an ordinary cudgel, beyond the bounds of sudden resentment, whereof he had died, it had been murder. This case supposes no attack on A's person, and no resistance to his putting the trespasser out of A's land; but had A gently laid his hands on B, to put him out, as he might lawfully, and B had resisted, his resistance had altered the case, as in nature being personal, and unlawfully opposing A's legal and personal act, and had been like the cases of the house, the inn, and fence, above stated. And in all the cases of the trespasser's resisting a legal attempt to put him out, the rule above applies, that is, "it is lawful to exert such force against a trespasser, who comes without any colour of right to take the goods of another, as is necessary to make him desist." See *Halloway's case*, Ch. 197, a. 7, s. 8,; and *Malice generally*, Ch. 197. And in every case, to extenuate the killing, it must appear it was done on a provocation at the

time, and not on an old grudge, as then it will amount to murder. **CH. 216.**  
**East's C. L. 239.** Even blows previously received will not **Art. 3.**  
 extenuate homicide upon deliberate malice and revenge, espe-  
 cially where it is to be collected from the circumstances that  
 the provocation was sought for the purpose of colouring the  
 revenge, *id.*, and 240, 241; and even though the malice and  
 revengeful temper arise during the struggle in which the kil-  
 ling is, as in that between the two brothers named Mason.  
 And cases of Mawgridge, Oneby, &c. *id.* 282, &c.

Mason's case.

§ 16. *Se defendendo* &c. depending on the legality of the **East's C. L.**  
 process: 1. The court or person issuing it must have juris- **809, &c.**  
 diction: 2. It must not be defective in the frame of it: 3.  
 The party executing it must be a legal officer for that purpose  
 or his assistant: 4. It must be executed according to law.  
 1. According to Lord Coke, a constable attempting to arrest  
 A by warrant from the high commission court, being killed by  
 A, was killed *se defendendo*, as he had no lawful authority.  
 But where a sergeant put a soldier under arrest, without au-  
 thority, and he killed the sergeant; held, manslaughter, and  
 Coke's opinion, above, was questioned, because not necessary  
 to kill him; and it is said, the warrant on such occasion makes  
 no difference; but the case must be judged on its own merit,  
 independent of that fact. 2. It is enough the process be legal  
 in the frame of it, from legal authority; no error or irregular-  
 ity, in the previous proceedings, will affect it, or excuse the  
 party killing the officer in the execution of it, from the guilt  
 of murder. Hence if a *ca. sa. fieri facias*, writ of assist-  
 ance, &c. issue to the officer, and he or any of his officers be  
 killed in its execution, when indicted for this murder it is  
 only necessary to produce the writ or warrant, without shew-  
 ing the judgment or decree; for, however erroneously issued,  
 the officer must obey, and is justified by it; and it is sufficient  
 it appears the magistrate had jurisdiction over the subject  
 matter, though the cause be not well expressed; it is enough  
 if the warrant contain the essential requisites of a warrant,  
 though strictly not legal. And on a general principle, if the  
 officer have not legal power there is no just occasion to kill  
 him; however this want of due authority reduces the offence  
 to manslaughter; but not if the killing be of premeditated  
 malice and cruelty. Blank warrants ought never to be issued.  
 3. The party executing the writ or warrant must be a legal  
 officer for that purpose, or his assistant, and duly notify his  
 business; but if he be a constable, or other known officer, *de*  
*facto*, acting within his district, it is sufficient, without proving  
 his appointment and swearing in. If an officer make an ar-  
 rest out of his district, or have no warrant or authority at all;  
 as if his name be inserted after the issuing of the writ or pro-

4 Inst. 338,  
 Rex v. Simp-  
 son.  
 Rex v. With-  
 ers, East's C.  
 L. 309, 310,  
 311, 312.

And also in  
 Rex v. Ro-  
 gers; Rex v.  
 Stockley.

East's C. L.  
 312, 313,  
 Gordon's  
 case.—See 1  
 Phil. Ev. 165,

Ch. 216.

Art. 4.

Rokeby's  
case.And Dixon's  
case.

East's C. L.  
314, 316, &  
Mackalley's  
case, Ch. 197,  
a. 7, s. 4.—9  
Co. 69.—1  
Salk. 334.—  
Gordon's  
case A. D.  
1789, Fa. t.,  
314, 316, 316,  
317, 319—  
Few's case,  
Cro. Car.  
183.

East's C. L.  
320, Rex v.  
Reason &  
Tranter.

East's C. L.  
325, 329.—  
Com. R. 13.

cess, without lawful authority, he is no legal officer, nor entitled to the special protection of the law; hence if killed, by the party injured, in the struggle, it is only manslaughter, not murder, but not *se defendendo*; but generally if the officer, in such case, kill the party for not submitting to such illegal process, it will be murder, as in another person it would be. As where the admiralty issued a warrant to Lord Danby to impress seamen; and B, his servant, without any warrant in writing, impressed D, not a seaman, who trying to escape was killed by B, adjudged murder. Though the officer must notify his business, a small matter will amount to due notice; as if he command the peace, or the officer in any other manner declares with what intent he interposes; or if the officer be in his proper district, and known, or but generally acknowledged, to bear the office he assumes; or if, to keep the peace, he produce his staff of office, or any other known ensign of office, the law presumes the party killing had due notice of his intents, especially if in the day time. Such was the evidence of notice in Gordon's case, no proof of constable's appointment or swearing in; but he had his staff, and gave notice &c.; and no express notice is necessary if the party know the officer and his business. 4. The process must be executed according to law. If the warrant be directed to several, any of them may execute it; and if the officer, in executing his writ &c., exceed his authority, the law gives him no protection in that excess. See this case, Ch. 89, a. 2, s. 18, stated, and Mr. Luttrell's death-bed declarations admitted; and though he had his sword &c., and used menacing words to Reason and Tranter, the bailiffs, yet they took revenge out of all proportion to his offence, and they indicated a diabolical fury, so guilty of manslaughter.

§ 17. *A third person interferes to prevent an arrest, and kills the officer.* How far can such third person avail himself of the illegality of the arrest, see Tooley's case, Ch. 179, a. 9, s. 22; and Hugget's case, Ch. 197, a. 7, s. 10; Foster. 312, 317, 328; Cro. Car. 371; 1 Hale, 465. A majority of the judges have been in the affirmative; but Foster J., and a minority of them in the negative.

#### ART. 4. *Indictment and evidence.*

§ 1. In this article it is intended only to notice a few matters peculiar to indictments and evidence in cases of homicide. Several of these peculiar matters have been already stated. In every case of a homicide a person is killed in a manner the more or the less criminal. The most criminal is murder, or killing with malice *prepenſe*. The least criminal, or in a way not at all criminal is killing in the execution of justice; as where the proper officer executes a criminal by hanging him

&c. strictly according to the judgment. Though homicide Ch. 216.  
varies so much in degrees, yet an indictment for murder may Art. 4.  
be made to answer the purpose in every degree; for on such an indictment the jury may find guilty of manslaughter, as in many cases before stated, or the jury may specially find the special matter, on which the court may adjudge the killing to be only *per infortunium, se defendendo*, or justifiable, or of necessity, &c. And it seems to be agreed that on an indictment for murder the prisoner's proper plea is not guilty, and his proper defence, or excuse, or justification is in evidence, and on that evidence the jury finds the true case in a special verdict, finding all the facts as in several cases before stated. But the grand jury may find a special indictment for manslaughter; and generally the accused is indicted either for murder or manslaughter in all cases of homicide. It is then material to attend to the formal as well as essential parts of an indictment for murder. In this the grand jury present, that A. B. of &c. not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on — at — with force and arms, in and upon one C. D. in the peace of God and of the Commonwealth, then and there being, feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said A. B. with a certain drawn sword made of iron and steel, of the value of fifty cents, which the said A. B. in his right hand, then and there had and held him, the said C. D. in and upon the left side of the belly of him the said C. D., then and there feloniously, wilfully, and of malice aforethought, did strike, thrust, stab, and penetrate, giving unto the said C. D. then and there with the sword drawn as aforesaid, in and upon the left side of the belly of him the said C. D. one mortal wound of the breadth of one inch, and of the depth of nine inches, of which mortal wound the said C. D. at — aforesaid, from the said fifth day of &c. — until — did languish, and languishing did live, on which said seventh day of &c. the said C. D. at — of the said mortal wound did die. So the jurors aforesaid, upon their oaths aforesaid, do say, that the said A. B. him the said C. D. in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder against the peace; or if the party dies instantly, then the indictment is, of which wound the same C. D. then and there instantly died. These are the formal as well as the essential parts of an indictment for murder; and if the killing be by drowning in a well, or by throwing a stone, or by cutting the throat, or by shooting, or in any other of the numerous ways of killing, it is only to state the facts and manner of killing precisely as they were. We in all our indictments for murder still state

4 Bl. Com.  
App. 3.—2  
Hawk. ch.  
23, s. 80, 81,  
82.—2 Inst.  
318, 319.—  
Kel. 125.—  
4 Bl. Com.  
197.—2  
Hale's P. C.  
186, 179.—  
East's C. L.  
340, &c.—  
Cro. El. 738.

СН. 216.

Art. 4.



the value of the instrument, though we have no deodands, and though no township is charged with the value of it. But the omission of such value does not vitiate the indictment as to the offence itself.

§ 2. Indictment for manslaughter by stabbing, as above, to "feloniously" included,—“and in the fury of his mind did make an assault, and that the said A. B. with a certain drawn sword, of the value &c. which he the said A. B. in his right hand then and there had and held, the said C. D. in and upon the right side of the belly near the short ribs of him the said C. D., (the said C. D. then and there not having any weapon drawn, nor the said C. D. then and there having first stricken the said A. B.) then and there in the fury of his mind feloniously did strike and stab, and that the said A. B. with the said sword to the said C. D. in and upon the right side of the belly, near the short ribs of him, said C. D., one mortal wound, of the breadth of four inches and of the depth of seven inches, then and there feloniously, and in the fury of his, the said A. B.'s mind did give, of which said mortal wound the said C. D. then and there instantly died.” And concludes as in case of murder, except for manslaughter the allegation is, the deft. did feloniously and in the fury of his mind kill and slay.

§ 3. And where the indictment for manslaughter or murder is grounded on any statute, it must be framed according to the essential words of it; also, conclude not only against the peace of &c., and the dignity of the same, but also against the form of the statute in such cases made and provided. And if the indictment so conclude where it need not, it is not vitiated, as against the form of the statute &c. when not necessary will be deemed *surplusage*, and that is where the statute does not make the felony; but where the statute makes the felony, then such conclusion is necessary to make the offence felony. According to several authorities the essential words in an indictment for murder are, *feloniously and of malice aforethought did kill and murder*, of manslaughter, *feloniously did kill*. Crown. C. C. 497.

§ 4. If A, B, and C kill and murder one, A as principal, and B and C as aiders and abettors, the indictment charges that all three feloniously, wilfully, and of their malice aforethought, did make an assault on him; then states that said A, a certain pistol of the value &c., so states accurately the killing and murder by A, the mode and manner; and then states that the said B and C then and there feloniously, wilfully, and of their malice aforethought, were present aiding, helping, abetting, comforting, assisting, and maintaining the said A, the felony and murder aforesaid, in manner and form aforesaid, to do and commit, and then the jurors conclude and say A, B,

and C then and there in manner and form aforesaid, feloniously, wilfully, and of their malice aforethought did kill and murder &c. And though one gives the stroke, all present aiding and abetting are equally culpable and deemed principals in murder; but anciently, he that struck the stroke whereof the party died was only principal, and those present aiding and assisting were but in the nature of accessaries, not to be tried till the principal was attainted or outlawed. Crown C. C. 492, 493; cites Hale's P. C. 437. But now the law is otherwise, therefore said B and C the aiders &c. present might be convicted, though A never appear, or is outlawed. But then to make the abetter principal, he must be present: 2. He must be aiding. Crown. C. C. 502, cites 1 Hale's P. C. 438.

CH. 216.  
Art. 4.

Mistaking the sort of poison will not vitiate the indictment, but stating any poison in the indictment is sufficient to maintain it, for the substance is whether the party was poisoned or not. 3 Inst. 49.

How to affect principals in the second degree &c. *Rex v. Borthwick*, Ch. 215, a. 3.

§ 5. Braley was indicted for the murder of his wife. Court impannelled a jury, which found the prisoner neglected to plead by the act of God; and the court decided not to proceed to try him on the indictment.

1 Mass. R.  
103, Commonwealth v. Braley.

§ 6. In an indictment for murder the word, *murder*, is absolutely essential in the description of the offence. But on an indictment not containing that word the deft. may be convicted of manslaughter.

Foster's C. L.  
304, 305.

§ 7. If an indictment charge that A gave the mortal stroke, and that B and C were present aiding and abetting, if it come out in evidence that B gave the mortal stroke, and that A and C were aiding and abetting, they may all be found guilty of murder or manslaughter at common law, as circumstances may vary the case. The identity of the person supposed to have given the stroke is but a circumstance, and in this case a very immaterial one; the stroke of one is in consideration of law the stroke of all.

Foster's C. L.  
351; cites 1 Hale's P. C. 437, 463.—  
2 Hale, 344.

§ 8. As the sheriff or officer must obey his precept, it is sufficient if only erroneous. And if a *capias ad satisfaciendum, fieri facias*, &c. issue, directed to him, and he or any of his officers be killed in the execution of the writ, it is sufficient evidence upon the indictment for this murder to produce the writ and warrant, and without shewing the judgment or decree.

Foster's C. L.  
311.

§ 9. So if a warrant be obtained from a justice of the peace in a matter in which he has jurisdiction, it is sufficient to protect the person executing it, though obtained by gross

Foster's C. L.  
312.



CH. 216. imposition on the justice ; but otherwise as to process defective in the frame of it.

Art. 4.

Kelyng, 29,  
Joyner's  
case.

§ 10. John Joyner was indicted for a felony in stealing a copper. The evidence proved it was fixed to the freehold, and as this evidence proved a trespass only, judgment was given for trespass. The jury found specially, and left it to the court to judge if felony or not, and it judged him a trespasser and fined him, and gave other punishment suitable in trespass. But *quare*.

East's C. L.  
344.—1 Hale,  
426.

§ 11. To constitute the crime of murder the stroke or poison &c. given must cause the party's death or hasten it, and if so, it is murder, though his life might have been saved with better care, medicine, and attendance ; for as Rolfe C. J. said, an offender of such a nature shall not apportion his own wrong. But if the hurt given were not dangerous in itself, but with ill application or otherwise the party die, and it clearly appears the death was owing to such application, and not to the hurt received, though administered in consequence of such hurt, it is not homicide.

East's C. L.  
340.

§ 12. Usually in cases of homicide the indictment is for murder, and thereon the true offence may be found, and the judgment will be adapted to the nature of the crime, and so the bail on *habeas corpus*. Where the offence, if specially presented, is short of felony, and the prisoner is charged with murder, his acquittal thereof is a perpetual bar to any other indictment for the same offence. But on a charge of murder the fact of killing being proved, the law presumes it founded in malice, until the accused proves the contrary, or till it appears in the government's evidence. The jury alone must decide on the truth of the facts alleged ; but whether taking them to be true the homicide be justified, excused, or alleviated, is a matter of law, on which the jury must be guided by the discretion of the court.

2 Hawk. ch.  
29, s. 23 —  
East's C. L.  
340.—Foster,  
256.—1  
Hawk. ch.  
31, s. 32.—  
4 Bl. Com.  
201.

§ 13. In each indictment it is necessary to state particularly the manner of the death, and the means by which effected ; and therefore if one be indicted for one species of killing, as by poisoning, he cannot be convicted by evidence of a totally different species of death, as by shooting, starving, or strangling. But if the means of death proved, agree in substance with that charged, it is sufficient : as s. 4. And as if one kind of weapon be alleged, and another proved, it does ;—so allegation with a *wooden staff*, proof with a *stone*, is well. It is usual to allege how the weapon was holden, but *quare* if this be necessary ;—so as to the value of it ;—so the manner of the *stroke* must be well described, and the word, "*struck*," is technical, where the death is by a blow, wound, bruise, or other assault ;—so the place and kind of wound &c. ought to

East's C. L.  
341, 342.—  
2 Hale, 185.  
—4 Bl. Com.  
196 —Shar-  
win's case,  
2 Hawk. c.  
23, s. 81, 82,  
83.—Kel. 135.  
—4 Co. 40,  
46.—2 Inst.  
318.  
Lad's case.  
A. D. 1774.

be described. If the indictment describe the wound &c. with sufficient certainty, the further addition of a further uncertain description of the same wound, is but surplusage. Though, however, the manner and place of the hurt must usually be stated, yet if on evidence it appear to be another kind of wound, in another place, of which the party died, it is sufficient to maintain the indictment. But in all cases, the death by the means stated, must be positively alleged, and cannot be taken by implication.

CH. 216.  
Art. 5.

§ 14. The time and place of the wound and of the death must be laid for obvious reasons. And in computing the year and day, the day on which the act was done is reckoned as the first; and this rule holds in cases of *felo de se*. But though the day or year be mistaken, yet it is not material, if it appear by the evidence the death happened in the limited time, without which the death is not attributed to the stroke or poison. If the name of the deceased be unknown, it may be laid to be a certain man, to the jurors unknown. Not necessary, though usual, to allege the party stricken was in the peace of God and of the king. In an indictment for murder, it is essential to allege the act was done *feloniously*, and of malice *aforethought*; as these words are material to constitute the crime of murder;—also that the defendant *murdered* the deceased. In manslaughter, *feloniously slew and killed*. And death by *misadventure* or *chance-medley* is charged to have been done *casually and by misfortune, against the will of the deft*. And if the word *murdered*, or the words, *malice aforethought*, be omitted, the deft. can be convicted only of manslaughter. As to other parts in indictments of homicide, see the forms above.

East's C. L.  
343, 345.—4  
Bl. Com. 197.  
—2 Hale,  
181, 186.—  
2 Hawk. ch.  
46, s. 41.

§ 15. In every indictment for murder, the jury may negative the higher offence, and find their verdict for any lesser species of homicide. And if the jury find the special matter from whence the law presumes malice, though they do not expressly find the malice in fact, yet judgment of death must be given. So though they do not find that the stroke was felonious.

East's C. L.  
371.—9 Co.  
69.

#### ART. 5. Rape.

§ 1. This crime is well described in the indictment of it. With the common introduction, *not having the fear of God &c.* charges the deft. that with force and arms, in and upon A. P. spinster, in the peace of God &c. then and there being, violently and felonious, did make an assault, and her, the said A. P. against her will, then and there feloniously did ravish and carnally know, against the form of the statute &c. and against the peace of the said Commonwealth. And if an infant under ten years of age, is the same, except a description

CH. 216.

Art. 5.



Indictment  
for, 6 Wentw.  
366—Cro.  
C. C. 658,  
660, 394.—  
Mass. Act, c.  
13, 1805.—  
Maine Act,  
ch. 3.—Ken-  
tucky Act of  
Dec. 19,  
1801, s. 7,  
taking away  
women of  
property  
against their  
will, two to  
seven years,  
s. 9, 10. Now  
a man may  
commit a  
rape on his  
concubine.

Mass. Act.  
Feb. 10,  
1816.

Mass. Act of  
March 16,  
1785.—15  
Mass. R. 187.

Mass. Act of  
1697.

Colony law  
of 1649.

Hale's P. C.  
628, 631.—4  
Bl. Com. 212.  
—East's C.  
L. 434, 449.  
—3 Inst. 59.

of her age, as an infant under the age of twenty-one years, to wit, of the age of nine years &c. in the peace of God &c. feloniously did make an assault, and her, the said E. then and there wickedly, unlawfully, and feloniously, did carnally know and abuse, against &c. Some late forms in this and other cases omit the words which relate to the Deity.

§ 2. This crime has been differently viewed and punished. There is no statute of the United States on the subject.

§ 3. This statute enacts, "that if any man shall ravish and carnally know any woman by force and against her will; or shall unlawfully and carnally know and abuse any woman child, under the age of ten years, every such offender, and any person present, aiding and consenting to such rape, or accessory thereto before the fact, by counselling, procuring, or commanding such rape to be committed," and convicted in the Supreme Judicial Court of either of the said felonies and offences aforesaid, shall suffer the punishment of death.

§ 4. Sect. 2,—punishment for accessories after the fact, solitary imprisonment not above three months, and hard labour not above ten years.

§ 5. Sect. 3,—punishment for an attempt to commit a rape and for aiding, as for a felonious assault, solitary imprisonment not above three months, and hard labour not above ten years, or fine not above \$500, and imprisonment in the common gaol not exceeding one year.

§ 6. Sect. 4 repeals the former law.

This act punishes an assault made on such female child under ten years of age, with an intent to commit a rape, with solitary imprisonment not above four months, and hard labour for any term of years or for life. This act of 1816 gives no particular description of this crime. This act of 1785 was rather more particular, as it added, committing carnal copulation with her; the punishment also by this statute was death. Indictment for a rape, if the jury cannot agree, may find defendant guilty of an assault with intent to commit a rape.

§ 7. This act also made these crimes felonies, and punished them with death.

§ 8. This act punished the crime with death or some other grievous punishment, at the discretion of the court; but as to the child, death absolutely. A man cannot commit a rape on his own wife; she cannot retract the marriage consent.

§ 9. A boy under fourteen years of age is held incapable of committing a rape, but he may be principal in the second degree. To make a rape, there must be an actual penetration, or *res in re*, (as also in buggery,) but the least penetration makes it a rape or buggery, though there be no *emissio*

*seminis*. If a woman yield on menace of death, if she consent not, this cannot excuse, but is a rape. Different opinions as to *emissio seminis*. East's C. L. 437, 438. CH. 216. Art. 6.

§ 10. The party ravished is in law a competent witness. But in every case of a rape, there ought to be corroborating evidence; for it is a crime (though to be severely punished,) easily charged, and hard to be proved, but harder to be defended against by the party accused, though never so innocent. And Hale has stated many cases of false charges. 1 Hale's P. C. 633, 635, 636.—4 Bl. Com. 213, 214.

§ 11. If a girl be ravished not old enough to know the meaning of an oath, she shall not be sworn, but the court ought, for information, to hear her story; for if she, at the time &c. tell the affair to her mother, sisters, or others, they shall be sworn, and they give the girl's story at second hand. Surely, then, says Hale, the court may and ought to receive her story directly from herself. 1 Hale's P. C. 634, 635. 4 Bl. Com. 214.

§ 12. This crime very anciently was capitally punished,—then by castration and loss of eyes; but the woman ravished, if single, might, if she pleased, redeem her ravisher from execution, if she elected him for a husband, and the offender consented. How one too young to be sworn, ought to be heard, East, 441, 444. 1 Hale's P. C. 627.—East's C. L. 434.

§ 13. By this statute the woman ravished might sue in forty days, and as the act expresses it, "common right shall be done;" and if none sue within forty days, the king shall have the suit, and the party convicted shall suffer two years imprisonment, and be ransomed at the king's pleasure. 13 Ed. I. st. 1, c. 34, again made rape a capital offence. But Ch. 96. a. 7, s. 11.—3 Ed. I. c. 13.

§ 14. By this statute the offence of rape was made felony, and rape is a crime at common law. Before the 13 Ed. I. rape had continued some time only a misdemeanor or trespass. 18 Eliz. and 3 W. & M. c. 9, *oust* clergy from principals in the first and second degree. A woman may conceive when ravished. East's C. L. 445. 18 Eliz. c. 7.

In this case, A. D. 1781, a large majority of the judges held that both penetration and emission are necessary to make a rape, after many different decisions as to emission. Perhaps, on a view of all the cases, this is the more general opinion, and the convictions where penetration only has been proved, have often been on the ground that penetration, *prima facie*, proves emission. East's C. L. 439, Hill's case.—M'Nally, 417, 418.

ART. 6. *Sodomy, &c.*

§ 1. This statute enacts, "that if any man shall commit the crime against nature, with a man or male child, or any man or woman shall have carnal copulation with a beast,"—punishment, solitary imprisonment not exceeding one year, and confinement to hard labour not above 10 years. Mass. Act, Mar. 16, 1806. —Maine Act, ch. 6.

CH. 216.

Art. 6.

Mass. Act,  
Mar. 3, 1785.  
—Indictment  
for, Cro. C.C.  
229, 230.  
Co. Ent. 351.

§ 2. By this act this crime was punished with death, and declared to be a felony, and the beast to be slain, and every part burnt. And by the Colony law of 1649, this crime was capitally punished. And so was the law of 1697. Punished in Maine in the state-prison.

§ 3. The United States have no statute on these subjects. These crimes, therefore, when committed in the Federal districts must be punished at common law, and of necessity.

4 Bl Com. 215.  
—28 H. VIII.  
c. 6—5 El. c.  
17.—Toul-  
min's Ken.  
Laws. 69;  
the punish-  
ment is in  
the peniten-  
tiary, p. 347.

§ 4. Blackstone, speaking of rape, also of these crimes against nature, and observing upon Hale's opinion above, as to the manner of proof, "which ought to be the more clear, in proportion as the crime is the more detestable, may be applied to another offence, of a still deeper malignity, the infamous crime against nature, committed either with man or beast; a crime which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offence of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should clearly be made out; for if false, it deserves a punishment inferior only to that of the crime itself." The English law very properly treats these crimes against nature, in its very indictments, as so detestable, as to be not fit to be named, "*peccatum illud horribile inter Christianos non nominandum.*" The Roman laws often observed the same taciturnity upon this subject. The punishment of these crimes has usually been capital, and continued by our law until new opinions arose as to capital crimes, which has, in a manner, done away capital punishments in the United States, and in several other countries. But in the times of popery these crimes were only subject to ecclesiastical censures. But since 25 H. VIII. c. 6, they have been made felonies in England, without benefit of clergy. And in sodomy, if both parties have arrived at years of discretion, both are equally to be punished, "*agentis et consentientis pari pena plectuntur;*" but if committed with a boy, under the age of discretion, that is, under fourteen years old, then the buggerer only is a felon; and those that are present, aiding and abetting, are also principals. Where the statute makes such a crime felony, in general there may be accessaries before and after the fact; but our act of 1805, does not seem to admit of accessaries.

1 Hale's P.C.  
670.

Act of Con.  
Mar. 3, 1801.

§ 5. It has been observed, there is no federal statute upon this and some other subjects in Federal districts, but to this observation there are exceptions. For instance, by this act of Congress, section 3, it is enacted, that "all felonies, committed within the county of Alexandria, shall be punished in the same manner as such crimes were punished by the laws of Virginia, as they existed prior to the year 1796." Thus

the laws of Virginia are repeatedly brought into practice in the District of Columbia. Ch. 217.  
Art. 1.

**ART. 7. *Several crimes.***

Section 27, of this act of Congress as to the navy, enacts, "all crimes committed by persons belonging to the navy, which are not specified in the foregoing articles, shall be punished according to the laws and customs in such cases at sea." Act of Con.  
April 23,  
1800.

## CHAPTER CCXVII.

### CRIMINAL CASES, PLEADINGS IN.

**ART. 1. *General principles.***

Having in the twenty next preceding chapters considered crimes and punishments generally, and each species of crime more in detail, its definition, and what is or is not such kind of crime, the punishment annexed to each at present, also formerly, in most cases; having also noticed briefly the proper pleas and evidence in most cases as applicable to each sort of crimes; and having in Chapter 193, a. 26 to 45, given a synopsis of pleadings in criminal cases, it may now be proper to attend to pleas in these cases more in detail. But it will be observed, in Ch. 193, a. 29, the parts of pleadings in criminal cases are arranged under thirty-seven heads, beginning with the complaint and going through to execution &c., in a summary manner; but then it is also observed, that this very summary view does not shew fully the principles on which these pleadings are founded; hence these principles ought to be more fully stated in several cases. A fair but concise view is as much as can be expected in this work as to some parts of pleadings in criminal cases; but as to other parts it is necessary to go considerably into detail, especially as to the material parts of the forms. For instance, though Ch. 193, a. 27, it is stated on what principles a complaint in a criminal case ought to be made, that is, on the principles of the Federal and State constitutions, yet nothing has, as yet, been said as to the material parts of the forms of complaints in the various cases of various sorts of crimes. This then is now to be done. But Ch. 193, a. 28, and Ch. 150, a. 9, as to surety of the peace and good behaviour, as much has been al-

CH. 217. ready written in this work as is consistent with the general plan of it ; therefore, in the ensuing chapters, some parts of the synopsis in criminal cases, will be enlarged upon, and some not.

ART. 2. *Complaint.*

§ 1. Wherever a crime is committed, the true and general course is to make complaint to a proper magistrate, court, or grand jury, which has legal authority to take cognizance of the offence ; and this complaint must be on oath, either alleging directly the fact done or crime committed, or alleging the complainant does suspect, and has good cause to suspect, it is committed. And the complaint must allege the crime committed, or the suspicion in different cases, according to the well settled principles of law. As to some facts, the complaint must positively state they are or have been committed ; and as to these, alleging suspicion is not sufficient. As to other facts, alleging suspicion, and good cause to suspect, is enough. But “ without a fact suspicion is no cause of arrest ;” that is, there must be a felony or offence, in fact, committed, and suspicion is only as to the person. For instance, a husband complains to the proper court of his wife’s adultery, in order to be divorced *a vinculo*, he must in his complaint positively state or allege, that at a time and place, to be described, they were joined in marriage, according to law ; that when her lawful husband, she, at a time and place to be described, committed the crime of adultery with such a person, by name, if known, or if not known, then with a man not known ;—and pray process &c. Now as in most cases the law does not allow a complaint on suspicion, however well founded, but such facts must be absolutely alleged. So if the complaint be of an assault and battery, it must be on oath, and positive, whether to a justice or grand jury, that at a time and place described, the accused, with force and arms, did assault, beat, wound, and ill-treat the complainant, or the person in fact assaulted &c. and did other wrongs, against the peace &c.

2 Cro. 194,  
Coxe v. Wir-  
rall.

See s. 9, post. § 2. But in regard to a complaint to obtain a search-warrant, the case is different as to part of the facts ; as to part the complainant must swear positively the facts have been done, as that his goods have been stolen ; but as to part of the facts he charges on suspicion, as that he suspects &c. they are in such a house ; as in the subjoined note.\* But suspicion does

\* *Complaint for a search warrant.* To A. B. Esq. one of the justices of the peace &c., complains C. D. of &c., and on oath declares that (within a time named certain goods, particularly describing them,) have by some person or persons unknown, been feloniously taken, stolen, and carried away out of the complainant’s possession in said S. ; and that the complainant hath probable cause to suspect, and doth suspect the said goods so stolen and carried away are concealed in the —, and that they were stolen by

not always excuse the officer, especially when he informs. As where an excise officer informed and got a search-warrant to search for excised goods in A's house and found none in it. The court held, the officer was liable in an action of trespass, and that on the trial he must shew the grounds of his suspicion. And 6 Com. D. 259. This was an important case twice argued, grounded on a statute, the words of which seemed to protect the officer, though a true construction of it did not. It is also important, because the same construction ought to be given of our impost and excise laws in like cases. 10 Geo. I. c. 10, s. 13, enacted, that if any officer shall have cause to suspect that any coffee, tea, &c. is fraudulently concealed in any place, (in London &c.) on oath made by him before two commissioners for the duties, stating the ground of his suspicion, they by warrant may authorize him by day or by night &c. to enter such places and seize and carry away the coffee, tea, &c. so found concealed, as forfeited to the king with the

CH. 217.  
Art. 2.

3 Wils. 434,  
Bostock v.  
Saunders &  
al.—1 D. & E.  
535.—2 W.  
Bl. 912.—  
2 Wils. 291.—  
Salk. 408,  
409.

one &c., and therefore, he prays for a warrant to search for said goods and to take him or them in whose possession the same may be found, and have them with said goods before lawful authority. This complaint the complainant signs and swears to.

On this complaint the justice issues his warrant directed to the sheriff of &c. or his deputy, or to any constable of the town &c., grounded on the same suspicion, stating in the warrant, usually annexed to the complaint, or reciting the substance of it, information is made &c., and requiring the officer in the name of the Commonwealth, with necessary and proper assistance to make diligent search in the day-time for the said goods in the place suspected as aforesaid, and if the same or any part of them, shall be found upon such search, that you bring the said goods so found, with the person or persons in whose possession the same be found, before me (or some other Justice &c.) to be disposed of and dealt with according to law; and you are alike required &c. Thus, as to some facts the process and proceedings are upon suspicion, but this suspicion ought to be carefully examined and cautiously admitted by the magistrate, otherwise it may be made an engine of malice and ill-will; but as search-warrants are of public convenience they are admitted in the English and our law, under the following cautions and restrictions: 1. They ought to be made on oath that a felony is committed: 2. That the complainant has probable cause to suspect that they are in such a house or place: 3. That he doth suspect &c.: 4. Shews the reasons of such suspicion: 5. It must be expressed in the warrant that the search be made in the day-time: 6. Ought to be directed to a constable or proper officer: 7. It is fit the complainant be present at the search, for he knows the goods: 8. The warrant ought to command the goods found, and party with whom found, to be brought before some justice of the peace.

2 Hale's P. C.  
149; 150, 151.

*Execution.* Whether the stolen goods are in the suspected house or not, the officer and his assistants may in the day-time enter by open doors to make search. If the door be shut, and on demand it be refused to be opened by those within, if the stolen goods be there, the officer may break open the door and he and his assistants justify it on the general issue. If the goods be not in the house, yet it seems the officer is excused who breaks open the door to search by his warrant; but the complainant in such case is punishable, for as to him the breaking the door is lawful if the goods be there, if not, then unlawful. If it appear to the justice the goods were not stolen, he must restore them to the possessor;—if stolen, to be lodged in the officer's hands. If it appear the possessor knew not they were stolen, he may be discharged as an offender, and be recognised as a witness; if he knew them to be stolen, may be recognised to answer.



CH. 217. bags &c., and if any person resisted such search he forfeited  
*Art. 2.* £100. Saunders, the excise officer, on his own oath of suspicion got this warrant, and thereon entered the pl<sup>t</sup>'s. house &c. with the other de<sup>f</sup>'s., his assistants, and found nothing, and on the trial they shewed not their ground of suspicion. Judgment against them. De Grey Ld. C. J. stated the case, and said, the de<sup>f</sup>., Saunders, got the warrant on his own oath, and his case was different from that of a sheriff, bailiff, bound to execute the warrant. But here Saunders, the excise officer, is the party promoting and acting for his own benefit under a power obtained by his own oath, and he is not bound to obey like such bailiff. His suspicion proved groundless. He "acted at his peril, and is a mere volunteer," as the informer is in a common law case;—and cited Hale's opinion, above stated; he thought the commissioners bound to grant the warrant on S's oath, and could not judge; and it is reasonable the informer who procures the warrant and executes it be answerable. The other judges agreed.

Act of Congress, March 2, 1799.

Sect. 68 of this act enacts, that "every collector, naval officer, and surveyor, or other person specially appointed by either of them for the purpose," if he "shall have cause to suspect a concealment" of any goods, wares, and merchandise subject to duties, in any particular dwelling-house, store, building, or other place, shall, upon proper application on oath to any justice of the peace, be entitled to a warrant to enter such house, store, or other place, (in the day-time only) and there to search for such goods; and if any shall be found, to seize and secure the same for trial; and all such goods, wares, and merchandise, on which the duties shall not have been paid or secured to be paid, shall be forfeited." By sect. 91, the officer is entitled to a part of the forfeited goods.

When one of these officers proceeds on his search-warrant on this act of Congress, he proceeds on one obtained on his own oath, and in part for his own benefit, and therefore his case seems to be to every substantial purpose that of Saunders, above stated; and it is reasonable it should be so, for it would be insufferable to allow one of these officers or his appointee, on his own oath and information, to get a search-warrant so much for his own benefit, and on it to search and overhaul any man's house, desks, chests, &c. with impunity, though he finds no run or forfeited goods in it, but where the owner of it is perfectly innocent.

4 Mass. R. 496.

§ 3. And regularly this complaint in a criminal case of whatever description must be recited in the mittimus or warrant of commitment from the justice, as this is founded on the complaint in the case, or this warrant may be on the same

paper and refer to the complaint, and this for the information of the court on *habeas corpus*. CH. 217.  
Art. 2.

§ 4. And every such warrant issued by a justice of the peace is illegal, unless it state some good cause certain and supported by oath ; and regularly this good and certain cause ought to be found in the complaint. 3 Cranch, 448, *Barford's case*.

§ 5. The complaint in a criminal case is as the declaration in the civil action, the main foundation on which all the subsequent proceedings in the cause depend ; and therefore, the complaint ought always to be well formed with technical accuracy, and always to contain a true and legal statement of the offence charged ; a true designation of the court, magistrate, or commissioners who receive the complaint of the party complained against ; and conclude with praying for proper process. Indeed, more accuracy and certainty is required in a complaint in a criminal case than in a declaration in a civil action, because usually, if this declaration be informal or defective, it may be amended ; not in general can this complaint be ; hence, it is every way so much the more necessary that it be correctly and truly framed in the first instance.

§ 6. Complaints are of two sorts : 1. Complaints on which the accused is arrested and committed for some offence, treason, felony, or trespass committed or alleged to be committed by him in the county or district in which the complaint is exhibited, and for which offence an indictment may be afterwards found, or information filed ; as the trial and judgment in such case will be, not on the complaint, but upon the indictment or information, so much technical accuracy is not required in this kind of complaint, as in the second kind, that is, a complaint on which the accused is tried and adjudged, as is often the case before a justice of the peace. In this case there ought to be all precision and certainty usually required in an indictment or information.

§ 7. There is one general rule that applies in every case of a complaint, and especially of the second description, that is, the complaint must state fully and accurately the offence intended to be proved, and in the manner and legal language in which it is expected or meant to be proved.

§ 8. But as in future chapters much attention will be paid to the proper descriptions of offences in our indictments, and in regard to various crimes, it will not be necessary here to attend to such descriptions in complaints, because the proper description of the offence in an indictment will serve for the complaint.

§ 9. *Trespass quare clausum fregit &c.*—entering the plt's dwelling-house and breaking open his doors &c. and taking away ninety-three barrels of flour &c. Defts. pleaded sepa- 10 Johns. R. 263, 266, *Bell v. Clap & al.*

CH. 217.

Art. 3.



ately, not guilty : 2. Also justified under the justice's search-warrant. Held, a search-warrant under the hand and seal of the justice, reciting information on oath, that certain goods, describing them, had been stolen by A and B, and were concealed in the house of C, and commanding the officer to whom directed to enter the said house in the day-time and search for the articles stolen, and to bring them with C or the person in whose custody the goods should be found before the justice, is a legal warrant : 2. A plea of justification under such a warrant need not allege it was in fact executed in the day-time : 3. The officer in the execution of such a warrant, if the door be shut, may, after a demand and refusal to open it, break open the outer or other door of the house. Form of the special plea. In the case of *Entick v. Carrington*, search-warrants were allowed to be legal, and the breaking doors on them after demand and refusal to open &c.

2 Wils. 272,  
292.

ART. 3. *Warrant &c.*

See Ch. 193, a.  
29.—Ch. 220.

§ 1. This is a commission from a proper court or magistrate, to the proper officer or person, authorizing, and usually commanding, him to take, or to take and detain, a person or persons named therein, in certain specified cases, or to take, or to take, keep, and dispose of property mentioned in the warrant, in a case particularized. But a warrant signifies only an authority, it does not, *ex vi termini*, an instrument under seal. Willes, 411 ; but post.

2 Hale's P.C.  
110, 111.—4  
Bl. Com. 287,  
288.—3 Burr.  
1766, Ld.  
Mansfield  
said a part of  
a warrant not  
executed  
may be laid  
out of the  
case.—See  
Ch. 150, a. 2,  
s. 28.—Also  
4 Com. D.  
355.—2 Inst.  
52, 591.—Ar-  
rests by jus-  
tices, Mass.  
Act, Feb. 26,  
1796.

§ 2. *Arrest by warrant.* See Arrests. Warrants are regularly to be granted by justices of the peace, who, by Massachusetts statute, before stated, of March 16, 1784, are authorized to cause all criminal offenders, guilty, or suspected to be guilty, to be arrested ; also by an act of Congress, in Federal cases ; and bind to answer at the proper courts. If the accused be not indicted, or only suspected, the justice ought to examine the complainant on oath, and in writing ; as well to ascertain there is a crime actually committed, without which no warrant should be granted, as to prove the cause and probability of suspecting the party accused. This warrant ought to be under the hand and seal of the justice ; to set forth the time and place of making it, and the cause for which it is made ; be directed to the constable, or other peace officer, requiring him to bring the party before any justice of the county, or specially only before him who issues the warrant. A warrant must particularly name and describe the person against whom it is issued, and also the offence charged, or it is bad. And the offence charged must usually be recited from the complaint. A general warrant to apprehend all persons guilty of a certain crime, specified in the warrant, is illegal, and will not justify the officer. So is a warrant to

1 W. Bl. 555,  
Money v.  
Leach.—3  
Burr. 1692,  
Wilkes' case.  
—Lofft. 17.

apprehend the authors, printers, and publishers, of a certain seditious libel. The accuser must be recognized to prosecute. Ch. 217.  
Art. 3.

§ 3. But if the justice fear that rioters will re-assemble, he may make his warrant to any person to arrest them, in case they shall so re-assemble, without naming them, from the nature and necessity of the case. *Quere*, in Mass. 2 Hal. P. C.  
114, 115.—5  
East, 237.—2  
Maule & Sel.  
259.

§ 4. *Backing warrants.* A warrant of a justice of the peace in one county, must be backed, that is, signed by a justice of the peace in another county, before it can be there executed. Regularly, there ought to have been a fresh warrant in every county; but the practice of backing had long prevailed without law, and at last was authorized by acts 23 Geo. II. c. 26; 24 Geo. II. c. 55. Backing warrants has not been much practised here, and is bad, unless so done as to amount, in substance, to a new warrant. 4 Bl. Com.  
288.—See  
Mass. Act,  
1820, ch. 52.

§ 5. *To whom directed.* If the warrant be directed to an officer, he is bound to execute it generally, in his district, except in certain cases, where procured to be issued on his own oath and information, as in some cases of search warrants, before stated, and a few other like cases. And if the officer may execute, and do not, he may be indicted, fined, and imprisoned, for his negligence; but if directed to a private person, he is not bound to execute it; and if directed to one, but in some case of great necessity, it is questionable if his service of it will be good. And on the same principle, if a justice's warrant be directed to the constable of A, it is a question if he can execute it in the town of B, though it express a power to that purpose, and B is within the justice's jurisdiction; because in such case he must derive his power wholly from the justice, to execute it in B; this is very questionable, because our officers derive their powers to execute precepts from our laws, generally, and these laws authorize them to execute them, to act only in their own proper towns, counties, districts, &c. 2 Hal. P. C.  
110.

§ 6. *The manner of executing a warrant.* If an officer arrest a felon on a warrant, and he escapes into another county, the officer may pursue and take him there, upon fresh pursuit, and bring him before the justice that issued the warrant; but if before arrest he escape into another county, the officer cannot pursue, if for a mere misdemeanor, because out of the jurisdiction of the justice, who granted the warrant. But in case of a felony or affray, or dangerous wounding, the officer may pursue, and raise hue and cry, in another county, but if he takes him in a foreign county he must carry him before a justice, or to gaol there, for he does not take him purely by the warrant of the justice, but by the authority the law gives him, and the justice's warrant is a sufficient cause of suspi-

CH. 217. cion and pursuit. A private person must shew his warrant,  
 Art. 3. but only if demanded; but a known officer, as sheriff or constable, is not bound to shew his warrant, though demanded; it is enough for him to say, *I arrest you in the king's name*; but it is fit he lets the party know what he arrests him for.

As to breaking doors to arrest an offender, see Arrest. See also Commitment, Ch. 193, a. 30.

§ 7. *Form of a warrant.* The substantial parts in the form of a warrant are but few. It begins with the name of the authority under which it is issued, as "United States of America," or "Commonwealth of Massachusetts," &c.; contains next the county, as "Essex, ss.," or district, as Massachusetts district, &c. to which the officer's power is limited; by whom directed and issued; it names the officer, as sheriff, &c. to whom directed, greeting; and proceeds, "we command you that you forthwith take A B, of &c., if he may be found within your precinct, and him safely keep, so that you have him before [the court or magistrate intended,] then and there to answer as upon an indictment, information, or complaint, (as the case may be,) against him for,—so stating substantially the offence, as stated in the complaint, indictment, or information. The officer is then charged not to fail in his duty, and to make return of his warrant and doings. A lawful warrant must be under hand and seal; and contain the cause of commitment; and, if in execution, must state the party has been convicted. 6 D. & E. 509.

2 Inst. 52,  
 591.—Salk.  
 347.—4 D. &  
 E. 220

2 Stra. 934.—  
 2 Wils. 151.

§ 8. It must be expressed in the warrant to what gaol the party is to be carried. And though a warrant must state a charge, yet it need not state the information, evidence, or grounds of the charge; nor need it, in sedition and commitment, state the libel, for the charge being made the rest is in evidence.

1 Mass. R.  
 488.—Mass.  
 Act, Mar. 16,  
 1784.—  
 Maine Act,  
 ch. 76.

§ 9. Generally a justice of the peace has no power to direct his warrant to a private person. But *quære* if he may not when no officer is at hand. By this act, which gives our justices their powers in criminal cases, only "sheriffs, constables, and other officers," are empowered to execute justices' warrants. But, by the same act, justices may also command the assistance of "other persons present at any affray, riot, assault, or battery." It is the better construction of this statute, that a justice of the peace cannot direct his warrant to a private person. As to many warrants issued on Massachusetts statutes, in cases of taxes, fines, judgments, &c. see Ch. 15, and Ch. 136, in which the powers of officers, to do execution &c., are described. Form of the warrant in forcible entry and detainer, see that head; and warrants in sever-

al other cases. Warrants in admiralty cases, see Admiralty **CH. 217.**  
Jurisdiction ; and warrants of attornies, see Attornies. **Art. 3.**

§ 10. Because process is the same in one sort of treason as it is in another, the species of treason need not be mentioned in the warrant.

10 Mod. 334,  
Harvey's  
case.  
8 East, 319,  
Battye v.  
Gresley &  
five others.

§ 11. In this action of trespass against commissioners of bankruptcy, it was held, where they were to do a judicial act, as to issuing their warrant to arrest the bankrupt, it was enough they were together to do that act in its material parts, as to agree upon the substance of the warrant, if it shall or not issue to arrest the party, the manner of directing the warrant ; and when these things were done by them together, and directions given to their officer to draw up the warrant, the judicial act was substantially performed, and they might well sign the warrant separately.

§ 12. This case only proves, that where a statute, as 12 Car. II. c. 24, s. 25, directs justices to issue their warrants under their hands, a warrant is good without a seal. Here the statute describes the kind of warrant ; but this case by no means proves that if they are directed to issue their warrant generally, to levy a penalty &c., it must not be under seal.

Willes 411,  
412, Padfield  
v. Cabell & al.

§ 13. The warrant must be shewn to have been had by an excise officer, on an indictment against one for obstructing him in his office in making a seizure. A warrant may be good in part. 10 Johns. R. 293.

1 Bos. & P.  
187, Rex v.  
Brady. Rich-  
mond v. Day-  
ton.

§ 14. *Construction of a warrant.* Trespass for assault and false imprisonment ; and held, a warrant to arrest the party, "to the end he may become bound with sufficient sureties for his personal appearance at the next session of *oyer and terminer*," to be holden in London, "to answer the said indictment, and be further dealt with according to law," means the next sessions after the arrest, and not after the date of the warrant, and that the practice to renew the warrant, from sessions to sessions, was an expense for nothing, &c. Hence the officer may justify an arrest after the sessions next ensuing the date of the warrant.

8 D. & E.  
110, 111,  
Mayhew v.  
Parker & al.

§ 15. The deft. cannot be arrested on account of a warrant before it is made to the officer, and before the writ is delivered to the sheriff. And Lord Kenyon much doubted if the officer must not shew his warrant if a sight of it be demanded ; and it seems to be highly reasonable the accused should see or know the charge in it against him, that he may know what he has to do, &c.

8 D. & E. 187,  
188, Hall v.  
Roche.

## CHAPTER CCXVIII.

## INDICTMENTS.

*ART. 1. Indictments generally.*

See the forms  
of most of the  
English in-  
dictments re-  
ferred to, 6  
Went. Index.

§ 1. They have been briefly mentioned, Ch. 193, a. 32, where the general principles on which one is founded are in some few leading cases stated. But as the indictment is a very important part of pleadings in criminal cases, and is the foundation of all the proceedings in them in nine cases in ten at least; and as the accurate description of crimes and offences usually given in the indictments are useful and essential guides in forming complaints, common informations, as well as special ones, also in forming commitments, warrants to arrest offenders &c. it will be useful and proper in this part of this work to attend somewhat minutely to the essential parts of an indictment; also, to some further cases in which an indictment lies or not.

§ 2. In this and the following chapter as to indictments some rules and cases already stated will be repeated, either briefly to bring essential principles together into one concise view, or else to enlarge upon cases which have been merely noticed in former chapters, but generally rules and cases already stated will be merely referred to and very concisely.

§ 3. It is also very material to attend to this branch of pleadings very closely, because a branch of criminal law in the pleadings in which there has ever been much precision and accuracy required, and in no part of the whole system do we see pleas and allegations more critically considered, or more technically and correctly formed.

§ 4. In the cases of indictments our first questions naturally are: Where does an indictment lie? Where does it not lie? Where must it be formed at common law? When must it be on a statute or statutes? Or when may it be framed in either way? Having in a series of rules and cases answered the questions, and being prepared to draw up the indictment in any case, we then are naturally brought to attend to every part of it,—to the situation of the grand jury which must find it,—their numbers,—if legally drawn and formed, and their manner of proceeding,—the caption of the indictment,—and the many other parts of it in the various and different species of crimes and offences.

*ART. 2. Where does an indictment lie.*

§ 1. Or what is an indictable offence. In going over gen-

erally the whole ground of crimes and punishment in the preceding chapters, and briefly considering the proper indictment in the most material branches, this question of course has often occurred, and has been often answered; a concise reference to which is necessary,—as Ch. 148, a. 2, one is indictable for disobeying a statute or an order of sessions made by statute authority as to maintain a grandchild. So in several cases of civil actions grounded on torts the question has occurred, to wit, is the best remedy in the case a civil action, or a criminal prosecution, and so, almost of course, does an indictment lie or is here an indictable offence; Ch. 196, as to statutes on the constructions of which this question often depends. So Ch. 197, as to crimes generally many acts not indictable, because done of necessity, by accident, civil subjection, self-defence, by compulsion &c.\* Ch. 198, crimes against religion and morality indictable. Ch. 199, so crimes against the state, as treason &c. Ch. 200, so offences against the state, as felony in several cases. Ch. 201 to 211, offences against public polity when indictable. Ch. 212 to 216, offences affecting individuals when indictable.

§ 2. *Offences indictable.* It has already been stated that not only treason and felonies, and crimes against religion and morality are indictable, but all other crimes of a public nature and *mala in se*, though of an inferior kind, as misprisions and other contempts, all disturbances of the peace, all oppressions and other misdemeanors whatever, of a public evil example against the common law. This ground generally has been already sufficiently a subject of attention, the object now must be to attend further to those cases that run very near the line between offences indictable, and offences not indictable. And it is a general principle, when a statute prohibits a matter of public grievance, though of an inferior degree, and commands a matter of public convenience, as repairing a highway &c., every disobedience to such statute is indictable, because it is an offence against the public to do what a public statute forbids, or to neglect to do what such statute commands to be done; and every offence against the public is indictable, if the indictment be not excluded by the enactment of some other form of proceeding. But the indictment is barred whenever the party has been once fined in an action on such statute. And thus to obstruct the execution of a public statute by acting against, or by neglecting to obey it, is an offence indictable at common law, because the law notices such acting or negligence as an offence. So the offence is indictable whenever the statute inflicts a penalty and makes it recoverable by action of debt, bill, plaint, information, or otherwise. So indictable to refuse the office of overseer created by statute. *Rex v. Jones.*

CH. 218.  
Art. 2.

Forms of the  
indictment,  
4 Went. 227,  
230.

3 Bac. Abr.  
96.—1 Saund.  
135.

Dougl. 44,  
*Rex v. Smith.*  
—3 Bac. Abr.  
97.—2 Hawk.  
P. C. 211.—  
Stra. 1146.



CH. 218.  
Art. 2.

2 Burr. 799,  
806, Rex v.  
Robinson.

§ 4. *Indictable to disobey an order of court.* The statute of 43 El. c. 2, s. 7, empowered the Sessions to order the grandfather to maintain his grandchildren. The Sessions made an order on the deft. to pay certain sums weekly for the support of his two grandchildren, A and B. He was indicted for disobeying this order and the law, and found guilty, and on motion in arrest of judgment on the ground the statute gave a particular penalty, as 20s. a month for disobeying such order, to be recovered in a particular manner. The other party denied a particular remedy was given. Lord Mansfield—this is an indictment for disobeying an order of Sessions. The rule, he said, was, where a statute makes unlawful what was before law, and gives a specific remedy, that must be pursued; but where the offence was before punishable at common law, (as here for disobeying an order of court) and a statute adds a particular remedy by a summary proceeding, there either the common law or statute punishment may be pursued. The statute sanction is only cumulative.

Cowp. 650,  
Rex v. Balme.  
—4 D. & E.  
202.—1 Burr.  
643.

4 D. & E.  
451, 457, Rex  
v. Sainsbury.

§ 5. *How indictable for justices to interfere.* Held in this case, where two sets of justices have jurisdiction in the same place, as to grant licenses &c., and one set meets and exercises the power, it is an indictable offence in the other set afterwards to meet thereon and to attempt to exercise the power in the same case. The first set refused Hedger his license; the second set, two justices, granted it to him. Indictment at large, and the special matter all inserted in it. And 6 Went. 455, 460.

6 Mod. 306,  
Queen v.  
Birch & Hale.

*Fraud in taxing.* They were indicted, found guilty, and sentenced to the pillory for a misdemeanor, for being assessors and collectors of taxes in such a parish, they assessed some at too high a rate, and omitted to tax some others in their books, yet levied the taxes upon them and put the money into their own pockets. Lies for refusing a public office, as of constable. 2 Stra. 920, Rex v. Lone.

1 Stra. 420,  
Rex v. Reed;  
cites Salk.  
693.—3 Mod.  
139.

§ 6. *To call a justice a rogue and liar.* The deft. was indicted for saying of Sir Edward Lawrence, a justice of the peace in the execution of his office, you are a rogue and a liar. Held indictable, on a motion in arrest of judgment, though the deft. might have been committed for the contempt. And the court said the true distinction is, "where the words are spoken in the presence of the justice there he may commit; but where it is behind his back the party can be only indicted for a breach of the peace." Spoken of him in his absence, as saying he is a rogue, not indictable; see next case.

Stra. 1157,  
Rex v. Po-  
coke.

3 Mod. 139,  
140, Rex v.  
Darby.  
But see the  
Queen v. Wrightson, next article.

§ 7. *So to call a justice a buffle headed fellow.* The deft. was indicted for saying of Sir J. K., a justice of the peace (not present,) viz. "Sir J. K. is a buffle-headed fellow, and doth

not understand law ; he is not fit to talk law with me ; I have baffled him and he hath not done my client justice." Held indictable, "because it respects the public peace," and imputes scandal to the government, and is as much as to say the king has appointed an ignorant man to be a justice of the peace. CH. 218.  
Art. 2.

§ 8. *Paunee refuses to deliver goods on tender of the debt.* 3 Salk. 268. This is an indictable offence, "because being secretly pawned it may be impossible to prove a delivery for want of witnesses in case he should bring an action of trover for them.

§ 9. *Having coining tools with intent—indictable.* The deft. was indicted "for unlawfully having in his custody and possession two iron stamps, with intent to impress the sceptres on sixpences, and to colour and pass them off for half guineas." Lord Hardwicke doubted if an indictable offence without shewing some use of them ; but after two arguments, held indictable, especially on account of the intent. So lading wool is lawful, but is an offence if with an intent to transport it. Punishment was fine, pillory, and imprisonment. 2 Stra. 1074,  
Rex v. Sutton.

§ 10. *Taking one's goods with force proved.* The deft. was indicted for taking 100 sheep with force and arms. Objected it was but a trespass. But *per curiam* an indictment lies for taking goods forcibly, but then such taking must be proved to be a breach of the peace." 3 Salk. 187.  
—See Ch.  
211, a. 9.

§ 11. *Lies for persuading a justice not to take bail.* The deft. was indicted for causing the prosecutor to be arrested &c., and though good bail was offered, the deft. intending to oppress &c. persuaded the justice not to take it, and the prosecutor was committed ; that Tracy persuaded the gaoler to lay him in irons, and the gaoler by that means extorted £5 from him. Held indictable, and that Tracy was the cause, and guilty of the gaoler's oppression also. 3 Salk. 192,  
Rex v. Tracy.

§ 12. *Writing a scandalous letter to one.* The deft. was indicted at the sessions for writing a scandalous letter to one Milleth, concerning a young woman whom he intended to marry ;—and held an indictable offence, "because it tended to a breach of the peace ;" and also indictable in the sessions. 3 Salk. 194,  
Rex v. Summers.

§ 13. *Stealing, though goods be delivered.* The deft. came to a seamstress' shop, and asked her to shew him some linen ; and she delivered it into his hands, and he ran away with it : held an indictable offence, for it was not out of her possession ; because though the contract might be begun by asking and setting the price, yet it was not perfected, and his running away proved his intent to steal. 3 Salk. 194.

§ 14. *So an indictable crime, though possession be obtained by form of process.* The deft. had no title to a house, but 3 Salk. 194.

CH. 218.  
Art. 2.

yet sued ejectment, and got an affidavit filed of notice to the tenant, and for want of appearance, got judgment and possession, and in common form; and seized all the goods, and converted them to his own use. He was indicted and executed for felony, "for here he made use of the process of the law with a felonious purpose.

3 Salk. 93,  
Rex v.  
Wright.

§ 15. *How indictable to let one escape committed for a forcible entry.* Justices of the peace committed T. S. for a forcible entry; and the deft. let him escape. On error objected, it was not stated how the commitment was made, whether on view or indictment found; nor stated duly committed. *Sed per curiam*, it is only inducement to the offence laid in the indictment, and after verdict it shall be intended the commitment was legal.

Stra. 1144,  
Rex v.  
O'Brian.

§ 16. *Publishing a false affidavit knowingly, is indictable.* The deft. was indicted for intending to defraud the king, and unjustly to procure a payment to be made as to an officer's widow. She knowingly published a certain false and counterfeit affidavit, purporting to have been sworn by one Elizabeth Roe before a justice, by which £5 6s. 8d. of the paymaster of the king's bounty was received. This was laid as an offence at common law. On motion in arrest of judgment it was objected, as no forgery was laid, it was no offence at common law; but judgment against the deft.; for it is an offence at common law. So publishing a scandalous petition presented to the House of Lords.

1 Ld. Raym.  
341.

1 Salk. 331.  
—2 Stra. 920.  
—3 Salk.  
187.

§ 17. *Officers when indictable.* A sheriff may be indicted for refusing to execute *fieri facias* till his fees be paid; or rather, if he first demand and receive his fees, he may be indicted for extortion. Indictment supported against overseers for refusing to account.

2 Stra. 920,  
1146.—1  
Salk. 381.

§ 18. So indictment lies against a constable for refusing to serve in the office;—so for neglecting any duty required by common law or statute;—so against an overseer of the poor for refusing to serve.

6 East, 136.

§ 19. So it lies against public officers for enabling accountants to pass false accounts in fraud of the revenue.

2 Mass. R.  
136.

If a justice of the peace alter a writ &c. is not indictable, unless charged as a forgery.

Dougl. 534,  
Rex v. Routledge.

§ 20. But usually in all these cases of indictments against officers for refusing to serve, the power of appointment, as well as the actual appointment, must be stated, and especially if by corporations and local authorities. A constable is indictable for suffering a street-walker delivered to his custody by one of the nightly watch, to escape. And see what is a sufficient charge. Indictment against him for not taking an office, being elected to it under custom, 4 Wentw. 332, 338,

2 Burr. 664,  
Rex v. Bootie.

And indictment, 6  
Wentw. 418,  
421, 423.

5 counts; Cro. C. C. 296, 302; indictment against a constable for not presenting a parish for not repairing a highway. Indictment against a justice for partiality, in refusing to grant a license, 4 Wentw. 364, 369.

CH. 218.  
Art. 2.

*Dead bodies.* The deft. was indicted for entering a certain burying-ground, and taking up a dead body for dissection: held, an indictable offence, as being *contra bonos mores*. The same decision was made in this State a few years since. Lynn was fined five marks, because no person before had been punished for this offence in a criminal court in England. Massachusetts Supreme Judicial Court, Essex, November Term, 1819, Dr. Sewell fined \$400 for this offence; also another, \$400.

2 D. & E.  
733, 734.  
Rex v. Lynn.  
—French  
Penal Code,  
360, impris-  
sons and  
fines.—Act of  
Maine, ch.  
16.

§ 21. *Killing another's horse.* The deft. was indicted for maliciously killing the horse of another: held good, though not charged to be secretly done;—mere invasion of private property.

1 Dallas, 338,  
The State v.  
Teischer.

§ 22. As none of the acts of jeofails extend to indictments, they are not aided by verdicts.

2 Hale's P.  
C. 193.

§ 23. Lies against an officer for an abuse in the execution of an office, as the removal of a sick poor person.

2 Mod. 326.

§ 24. So it lies for a bad contrivance, though not executed, as for a contrivance to kill A;—so for an attempt to pick a pocket, or to commit sodomy;—so if any one collect money for the public use, and does not pay it over; but a. 3, s. 3;—so if any one by false insinuations gets a note or an account signed into his hands, and then cancels it.

4 Com. D.  
370, 371;  
and 6 Mod.  
176.

§ 25. So it lies for maliciously blackening the memory of one deceased; but it must be alleged to be done with a design to bring contempt upon his family, and to stir up the hatred of the people against them, and to excite his relations to a breach of the peace.

5 Co. 125.—  
4 D. & E.  
126, Rex v.  
Topham.

One may be indicted for setting up a fair or market.

6 Mod. 183.

§ 26. The deft. was indicted for a misdemeanor at the sessions, and convicted for soliciting a servant to steal his master's goods. Held, an indictable misdemeanor, though not charged the servant stole the goods, nor that any other act was done, except the soliciting and inciting; and so is indictable at the sessions, having a tendency to a breach of the peace. This cause, on error brought, was twice largely argued. Lord Kenyon said, in this case the solicitation was an act done. And per Grose J. "inciting another to commit a misdemeanor is itself a misdemeanor;" and certainly so to incite one to commit a felony. And per Lawrence J. "a solicitation is an act." See a. 2, s. 6; Rex v. Rispal, 3 Burr. 1320. So indictable to endeavour to provoke a duel. 3 Wils. Works,

2 East, 6 to  
23, Rex v.  
Higgins.

CH. 218. 79; 3 East, 581; 6 East, 464; 6 East, 126; 1 Bos. & P. 180; 2 Dall. 299, *United States v. Ravara*.

Art. 3.

3 Maule &  
Sel. R. 11, 15,  
The King v.  
Dixon.

§ 27. To mix alum in bread, so as that crude lumps are found in it, is indictable. The indictment charged that the deft. delivered to J. H. divers loaves as for good household bread, for the use and supply of the military asylum, and the children belonging thereto; whereas the said loaves were not good household bread, but contained divers noxious and unwholesome materials, not fit for the food of man. Held, sufficiently certain without stating what the noxious materials were, or that the deft. intended to injure the children's health.

3 Maule &  
Sel. R. 67,  
The King v.  
De Berenger  
& al.

§ 28. Indictable to conspire on a particular day, by false rumours, to raise the price of the public government funds, with intent to injure the subjects who should purchase on that day; and the indictment good, without specifying the particular persons who purchased, as the persons intended to be injured. Court will take judicial notice, a war exists, in which England is involved. One report circulated was, that the Emperor Napoleon was killed, and there would soon be a peace.

4 Maule &  
Sel. R. 73,  
The King v.  
Vantandillo.—  
Pole's P. C.  
432.

§ 29. *Spreading infection &c.* Deft. was indicted for unlawfully and injuriously carrying her child, while infected with the smallpox, along a public highway in which persons were passing, and near to the habitations of the king's subjects;—form of the indictment. Held indictable.

3 Day's Ca.  
1083, Knowles  
v. The State.

§ 30. Every public show and exhibition which outrages decency, shocks humanity, or is *contra bonos mores*, is indictable at common law;—must be specially stated.

4 Day's Ca.  
469, United  
States v.  
PHELPS.

§ 31. Is an indictable offence to resist assistants, appointed by the surveyor of a port, in the execution of the duties of their office; and the indictment must describe such offence truly. And a warrant from a surveyor of the customs, appointing an inspector, is not sufficient evidence of his appointment to support the indictment, the collector being the only person authorized to make such appointment.

4 Bl. Com.  
214.

§ 32. Indictment lies for false imprisonment, and the punishment at common law is fine and imprisonment.

See Ch. 148.  
—2 Burr. 803.  
—Castle's  
case, Cro. J.  
643.—3 Salk.  
189.—3  
Salk. 25,  
Rex v. Douse.

ART. 3. *Where an indictment lies not.*

§ 1. *Statute makes a new offence.* It has been already stated, if a statute create a new offence, no way prohibited at common law, and appoints a particular proceeding against the offender, as by action of debt, bill, plaint, &c. and names not an indictment, an indictment does not lie. 1 Ld. Raym. 672; 2 Ld. Raym. 991; 1 Ld. Raym. 347; 1 Burr. 543; see art. 14, *postea*; 4 Com. D. 372; 1 Mod. 34.

*Acting against by-laws* is not an indictable offence, being only an offence against the by-laws of a certain town or place, and not against the general laws of the land. The deft. was indicted for exercising the trade of a farrier, contrary to the laws of the borough of Lancaster. CH. 218.  
Art. 3.  
4 D. & E.  
777, Rex v.  
Sharpless.  
Salk. 390.—  
2 Stra. 1268.

§ 2. *Enticing away an apprentice.* For this an indictment does not lie; nor for not receiving one, but on some statute. 3 Salk. 191.

§ 3. If a constable seize money, and refuse to deliver it to a justice, not indictable;—but a. 2. s. 24. 3 Salk. 188.

§ 4. *Lies not for a private wrong.* Deft. was indicted for that she intending to deprive H. B. of several sums of money, did falsely and maliciously accuse him of felony, and of robbing her. Held, not indictable; but a private wrong, not a public crime, not being laid by way of conspiracy. 3 Salk. 188,  
Rex v. Stone-  
house.

So the deft. was indicted for disobeying an order of a justice of the peace, made on a company of tanners, to admit one Young to be a freeman of that company. Held, not indictable—is only a nonfeasance, and particular wrong done to another. 3 Salk. 188,  
Rex v. Atkin-  
son.

§ 5. So the justice ordered the deft. to pay Stephen Paine, a tailor, £7 for work done, and he refused, and was indicted; held, not indictable,—was but a private wrong. So the deft. was indicted for not curing the prosecutor of an ulcerated throat, as he had engaged to do. Held, not indictable; no public offence, but a mere private wrong;—indictment quashed. And 1 *Ld. Raym.* 366. 3 Salk. 189,  
Rex v.  
Brown.—3  
Salk. 189,  
Rex v. Brad-  
ford.

§ 6. To entice one to steal is not indictable, unless some of the goods be actually taken away. But see *Higgins' case*, a. 2. s. 26. 3 Salk. 42.

One is not indictable for being a vagrant. 3 Salk. 268.

§ 7. *Casual damage.* Defts. were indicted for throwing down skins into a man's yard, which was a public highway, by which another man's eye was beat out;—evidence was, the wind took the skin, and blew it out of the way, and so the damage happened: deft. acquitted. So was the case in *Hobart*, 134, where, in exercising, a soldier wounded another,—not indictable. And so the case in the year books,—a man lopping a tree, where the bough was blown at a distance, and killed a man,—not indictable. 1 Stra. 190,  
191, Rex v.  
Gill & al.

§ 8. *Miller detains corn.* The deft. was indicted for that he kept a common grist-mill, and being employed by W. B. to grind three bushels of wheat, did with force and arms illegally take and detain forty-two pounds weight of wheat,—deft. demurred to this indictment, and judgment for him, there being no actual force laid; and the matter is of a private nature. 2 Stra. 793,  
Rex v. Chan-  
nell.—4 Com.  
D. 373.

## CH. 218.

## Art. 3.

2 Salk. 697,  
Queen v.  
Langley.—  
2 Ld. Raym.  
1031.—Hob.  
215.—Poph.  
140.

2 Salk. 698,  
Queen v.  
Wrightson.

4 Com. D.  
385, Rex v.  
Lense.—Cro.  
El. 689,  
Dean's case.

Cro. El. 78,  
Simon v.  
Sweete.

1 Ld. Raym.  
153, Rex v.  
Penny.

12 Mod. 445.

3 Burr. 1698.

1 Salk. 370,  
Queen v. Har-  
wood.

1 Salk. 370,  
Rex & Reg. v.  
Clerk.

§ 9. *Words to an officer not as to his office.* The deft. was indicted for saying to the Mayor of Salisbury, "You, Mr. Mayor, I care not a fart for you;" and at another day, "You are a rogue and a rascal;" but they were not spoken while in the execution of his office. Held, not to be an indictable offence; but otherwise if written. And it might be more doubtful if a *patent* officer, for then it is an aspersion to the government that employs him. Cited Holt on Libels, 231.

§ 10. So the deft. was indicted for saying of a justice of the peace, in a discourse concerning a warrant made by him, "Sir R. G. is a fool, an ass, and a coxcomb, for making such a warrant, and he knows no more than a slickhill." Held, not indictable, but cause to bind to the good behaviour. The reasoning of the deft's counsel was, though words spoken of a magistrate, in the execution of his office, might be indictable as a matter that disturbs the public peace; yet not when it refers to some particular act. But see Rex v. Revel, and Rex v. Darby above. Rex v. Revel, the words were spoken of the justice in the execution of his office; but it does not appear that was the case, Rex v. Darby. And this case has been denied to be law. 3 Mod. 139. Must be laid the words were spoken to him in the execution of his office. And in this case Dean called an Alderman of London, *fool and knave*, upon the Royal Exchange; and held, he could not be committed for this; but spoken in court, then a contempt, for which he might have been committed. And this case seems to have been considered on the same ground, this was calling the Mayor of Barnstable *a fool*; held, only cause for binding to the good behaviour.

So in this case the deft., Penny, was indicted for speaking of Mr. Martin, a justice of the peace, "I did not care if all the Martins had been hanged five years ago, and the justice is now turned out of his commission." Held, not an indictable offence, but that Martin should have brought his action.

§ 11. An indictment lies not against an inn-keeper for not receiving a sick person, unless averred he is a stranger.

§ 12. *A mere civil injury.* For this an indictment does not lie; nor for a mere intent to defraud. 2 Stra. 866.

§ 13. The deft. was indicted for words spoken with intent to injure the market of Barnstable, and to prevent the town taking toll, to wit: *I have got a judgment against the town that we shall not pay for standing, and they are fools that pay.* Not indictable. Indictment quashed.

§ 14. Preaching is not indictable, except forbidden by some statute, and then the indictment must conclude, *contra formam statuti*. No offence, at common law, to preach without license.

§ 15. If a statute be not prohibitory, but only that if any person shall do such a thing, he shall forfeit so much, to be recovered by action of debt, bill, plaint, or information, then he cannot be indicted for it; but the proceeding must be by action &c. CH. 218.  
Art. 4.  
Crown C. C.  
104.

§ 16. In this case the deft. was indicted for wantonly, cruelly, and outrageously, unlawfully, and unnecessarily beating, bruising, and torturing, &c. his own horse. Found guilty; but the court, on a motion in arrest of judgment, held the indictment did not lie. Different decision since in Baltimore. Not against a miller for receiving good barley to grind and delivering a mixture of oat and barley meal, musty and unwholesome, not the produce of the barley; otherwise if alleged to be delivered as man's food. Mass. S. J.  
Court, Aug.  
1796, Boston.  
4 Maule & S.  
214,—was a  
private cheat,  
like Rex v.  
Wheatly.

ART. 4. § 1. Grand jury having, in any case, ascertained that an indictment lies, the next thing to be attended to is the grand jury, in order to see if it be properly constituted to find the indictment. As to the statutes giving existence to grand juries, see Ch. 182. The indictment is a written accusation of a crime or misdemeanor; this the grand jury presents upon oath. To do this properly, it must consist of twelve at least, and not more than twenty-three, so that twelve may be the majority; and, to find the bill, twelve of this jury, at least, must agree; and it is a good presentment if twelve do agree. See Ch.  
182, a. 7, &  
12, &c.

§ 2. And the general principle is, that the grand jury must be disinterested. But this general rule has its exceptions; as where the fine, penalty, or forfeiture, in the case, goes in whole or in part to the State. And in this case the court held, that it is no sufficient objection to an indictment for an offence to which the law annexes a penalty, for the use of the town where the offence is committed, that the foreman of the grand jury who found the indictment, is a taxable inhabitant of such town; but the court also held, this interest was a sufficient objection at common law, but the objection is removed by a fair construction of our several statutes upon this subject; and if the objection be allowed, this offence cannot be punished. 6 Mass. R.90,  
Common-  
wealth v.  
Ryan.

*Presentment and indictment what.* Presentment is the notice taken by the grand jury of any offence from their own observation, without any bill of indictment laid before them, at the suit of the king, or here at the suit of the United States, or of a State; as the presentment of a nuisance &c., on which the public attorney must afterwards frame an indictment before the party presented can be put to answer. 4 Bl. Com.  
298.

§ 3. *Indictment* is a written accusation of one or more persons of a crime or misdemeanor, preferred to, and presented on oath by a grand jury. And in finding this indictment the 4 Bl. Com.  
299, 301.—2  
Hal. P. C. 161.



**CH. 218.** grand jury hears evidence only on behalf of the prosecution;  
**Art. 5.** for the finding of the indictment is only in the nature of an *accusation*, which is afterwards to be tried and determined; and  
 “the grand jury are only to inquire, upon their oaths, whether there be sufficient cause to call on the party to answer it.”  
 They are sworn to inquire only for the body of the county, and therefore cannot inquire of a fact out of the county, unless enabled so to do by statute. If a bill be laid before a grand jury against a party, and they find it not a true bill, a fresh bill may afterwards be preferred to another grand jury. If the grand jury are satisfied of the truth of the accusation, they find it a true bill, and the foreman signs his name, and as foreman.

**3 Bac. Abr. 94.** § 4. In trespass the jury find, the deft. feloniously took the goods; this verdict in a civil action, it is said, is an indictment; but this is not such a finding as our constitutions require. This way of proceeding by indictment, in all criminal cases, is most conformable to *Magna Charta*, most safe and regular, and it is most conformable to the spirit of our constitutions and practice in criminal causes. And the way to prosecute a capital offence is by indictment, in all cases, unless specially limited by some statute to be by bill, plaint, or information, and that constitutionally enacted.

**2 Hal. P. C. 151.**  
**3 Bac. Abr. 93, 95.** § 5. The grand jury may find part of a bill true, and the other part not true. So a bill for murder, true for manslaughter, and not true as to murder; and the court in the presence of the grand jury will strike out murder and malice aforethought, and alter the indictment accordingly; but the best way usually is, to find a new bill for manslaughter.

**ART. 5. Caption of an indictment.**

**1 Saund. 218, notes.—2 Haw. P. C. 253.—Mass. forms, U. States forms, &c.—3 Salk. 187, Rex v. Holliday.** § 1. The first part of it is the caption; this runs thus: *Suffolk, ss.* At a court of ———, holden at B, within and for the county of S, on ———, the jurors of the Commonwealth of Massachusetts, on their oaths present, that A B, of &c. The caption of an indictment is so material a part of it, that if wanting the indictment will be quashed. **3 Salk. 188.** But it is not essential in the indictment, it be stated the jury was impannelled. But the indictment, in this case, was quashed because it was not set forth the jury was charged to inquire of the body of the county. Caption amended. **1 Saund. 250.**

**2 Ld. Raym. 1038, The Queen v. Franklin.** § 2. The words *presentant existit*, instead of *presentatum existit*, in the caption of an indictment, makes the caption bad, and it cannot be amended after the term in which the caption was taken. “Caption is no part of the indictment.”

**1 Salk. 370.—1 Ld. Raym. 710, Rex v. Morgan.** § 3. In this case the caption of the indictment stated, that

the grand jury found the bill on their oaths. Held, the caption, in such case, need not allege they are sworn and charged. But it must appear they were sworn. 3 Mod. 12. CH. 218.  
Art. 6.

§ 4. Held, in this case, that no objection can be taken to the caption of an indictment after the term it comes in. And the caption is good, though it do not set forth the jury were sworn, at the place where, and at time when, they presented the indictment. But the words, *good and lawful men*, are necessary. Cro. El. 751. 2 Ld. Raym. 908.—1 Ld. Raym. 549, Rex v. Pheasant.

§ 5. The caption of the indictment must not call the *bill* an indictment till found; for till then only a *bill*. One quashed for this misnaming this instrument an *indictment* when it was only a *bill*. Salk. 376, Rex v. Brown.—1 Ld. Raym. 592.

§ 6. So a caption was deemed bad on error brought, because in the caption, the word *presentant* was used, and there was nothing to agree with it. The deft. was indicted for erecting a cottage; deemed no offence at common law. 1 Salk. 371, Rex & Reg. v. Trobridge.

§ 7. The indictment, in this case, contained two counts; one for a riot, endorsed by the grand jury, *ignoramus*; the other count for an assault; returned this *billa vera*, and held well. But this cannot be done where the indictment consists of one count only, or is entire. Rex v. Ford. Cowp. 325, Rex v. Field-house.

§ 8. Where an indictment is found at a certain court, and the caption states that court to have been holden on an *impossible* day, this mistake is fatal. 1 D. & E. 316, 320, Rex v. Fearnley.

§ 9. Indictment found at the sessions; the caption stated, the grand jury was sworn and charged, omitting the words "then and there;" this omission held fatal, and judgment arrested. 3 Johns. Ca. 265, The People v. Guernsey.

#### ART. 6. Joint and several.

§ 1. In framing an indictment where more than one person was concerned in committing the offence, the inquiry is early made, how far they can be joined in one indictment; also how far different offences may be joined in one indictment.

§ 2. It is a well settled principle, that every indictment is as well several as joint, joint or several as the facts happen. 1 Hal. P. C. 46.

§ 3. The defts., being collectors of several duties and sums of money collected of A B, not being assessed, and converted the same to their use; for this offence they were indicted together. And held well, though objected they ought to have been severally indicted. But Holt said, if it appears to be several offences there ought to be several indictments. Powell said, if two men commit a felony together, they may be jointly indicted. Holt,—so may two, if they join in a battery, though two several fines shall be laid on them; so in an indictment for felony; but they shall have several judgments. "It appeared both these collectors received the money joint-

11 Mod. 79, 80, Queen v. Atkinson & al.

Ch. 218. ly." Judgment against them. If several commit a robbery,  
 Art. 6. murder, burglary, &c., they may be joined in one indictment.

2 Hal. P. C.  
 173.

So may offences of several degrees depending on one another, as the principal in the first degree, and the principal in the second degree, namely : present, aiding and abetting the principal, and accessory before and after the fact. Salk. 382, two were indicted jointly, of extortion.

2 Hal. P. C.  
 174.

§ 4. A, B, C, and D, were indicted for erecting four inns, to the common nuisance. And held, that for several offences of the same nature several persons may be indicted in the same indictment ; but then it must be said *separately* erected &c. ; and for want of the word, *separately*, the indictment was quashed ; but the word *separately* would make it good, for it makes them *several indictments*. See *Commonwealth v. Symonds*, jun. But two cannot be indicted jointly, for not being apprentices. Larceny and embezzling bank-notes, may be joined. 3 Maule & S. 539.

Salk. 382.

2 Hal. P. C.  
 173.

§ 3. *Several offences*. If one commit several capital offences, as burglary and larceny, they may be contained in one indictment. So may larcenies, committed at several times, of several things, and from several persons.

3 D. & E. 98,  
 103, Young  
 & al. v. The  
 King, in error.

§ 6. But where the offences require several different judgments they cannot be joined. And Lord Kenyon,—where the legal judgment on each count is different they cannot be joined, otherwise they may ; and if several act in concert, they may be indicted together jointly, and it is no objection the indictment contains several charges of the same nature in different counts. The deft. was indicted for three offences ; special verdict finds him guilty of two, and refers it to the court, if guilty of the facts charged in the indictment. The court will adjudge him guilty of these two, and not guilty of the rest ; though it was urged the jury ought to have found on all three issues guilty on two, and not guilty on one, and not having so found, the verdict is bad for the whole.

2 Stra. 844,  
 Rex v. Hayes.

Lofft, 44, Rex  
 v. Metcalf &  
 al.

§ 7. Two defts. were convicted of the same offence on the same indictment. The court will not give judgment against one separately, except the other by any reasonable intendment cannot appear.

8 East, 41,  
 53, Rex v.  
 Kingston &  
 7 others.

§ 8. The first count in the indictment charged six defts., K., E., W., H., B., and B., so did the second count. Third count charged seven defts., to wit, said K., E., W., H., and B., and added W. and S. Fourth count charged six defts. and included one W., not before mentioned. Objected here was a misjoinder of counts unprecedented. Objection overruled. It was made on demurrer to the indictment, but admitted it might have been a ground of application to the discretion of the court to quash the indictment. But the court

said, "where to the offences so charged in the different counts there may be the same plea and the same judgment, there is no authority for saying that such joinder in one indictment is bad in point of law." The offence was the non-payment of monies the Sessions ordered the defts. to pay. CH. 218.  
Art. 7.

§ 9. Assault on two persons cannot be joined in the same indictment, though made by the same deft. Judgment arrested, for they are two distinct offences on two persons wholly disconnected. But *Lofft*, 274, two indicted for assaulting two, and held well. 2 Stra. 870,  
Rex v. Clin-  
don.

§ 10. This indictment was against six, jointly and severally, for exercising a trade, and the court quashed it because there ought to be distinct indictments, for each offence is entirely distinct. So several cannot be joined in one indictment for perjury. And in this case twelve persons were indicted jointly, for exercising the trade of tanning leather, *contra formam statuti*. Held bad, and quashed. 1 Stra. 623,  
Rex v. West-  
ton & al. 921.  
—4 Burr.  
2046, Rex v.  
Tucker & al.

§ 11. And generally it is best to indict several offenders separately whenever each one's defence is peculiar to himself; as to carry on a trade without having served seven years; and where the offence arises from a joint act not in itself criminal; for when so not criminal the joint act itself alone is no ground of an indictment; but the sole ground is the want of qualifications in each person, and each one's defect and not the joint act is the foundation of the indictment. It may be otherwise when they jointly do a criminal act. For these reasons, it is bad to indict jointly several for not repairing streets &c. Crown C. C.  
106, 116, 121.

ART. 7. *The body of the indictment.*

§ 1. Having settled the caption and who shall be indicted, and for what offence or offences, and against whom committed, the next thing is to frame the body of the indictment, whether consisting of one count or more. This body of the indictment may consist of an almost infinite variety of charges and expressions, in the thousands of offences and cases to which on various occasions it may be applied; nothing more then can be done here than state and explain several general rules in regard to this part of the indictment. And first it may be observed, that "an indictment is nothing else but a plain, brief, and certain narrative of an offence committed by any person and of those necessary circumstances that concur to ascertain the fact and its nature." 2 Hale's P. C.  
169.

§ 2. This is a good general rule, and many cases have been stated in the preceding chapters tending to shew the meaning of this rule. And it is a second general rule, that every fact material to constitute the offence charged must be alleged, and positively. Hence, if the deft. be indicted for disobeying an order of Sessions, the indictment must positively allege an 2 Ld. Raym.  
1363, Rex v.  
Crawhurst.—  
1 Salk. 370.

CH. 218. order was made, for it is of the essence of the charge, and of course it is bad to state the order by way of recital.

Art. 7.

§ 3. General rule is, when an indictment is framed on a statute which prohibits in general prohibitory words, a thing to be done, as to exercise a trade, not having served &c., it is enough to charge the offence generally in the words of the statute. And if a subsequent statute, and according to three justices, even a clause of exception in the same statute, excuses persons under such and such circumstances, or gives license to persons so and so qualified, so as to excuse or except them out of the general prohibitory words, that must come by way of plea or evidence, "that the party is not within such general prohibition, but excepted out of it." This rule holds, except where the exception is in the same clause or sentence with the prohibition. See statutes, Ch. 196, a. 3, where this rule is further explained;—may be in evidence; 1 Phil. Evid. 240, 241; 3 Camp. 222; 4 Burr. 2284, Sutton v. Bishop; Bul. N. P. 225.

2 Burr. 1035,  
Rex v. Pemberton.—1  
W. Bl. 230.—  
1 Bin. 201.—  
2 Mass. R.  
128, 530.—  
3 D. & E.  
536.—2 East,  
30.—Addis.  
171.—2 Bin.  
232.—4 Burr.  
2469, Sibly v.  
Cuming.

Dougl. 153,  
Rex v. Lyme  
Regis.

§ 4. Indictment is bad whenever all the facts charged in it may be true, and yet the accused may be innocent. The defendant ought to be able to know what he is called on to defend against. 15 Mass. R. 242.

§ 5. Defts., husband and wife, were indicted for assault and battery, and the indictment stated that they *vi et armis insultum fecit, verberaverunt, vulneraverunt, &c.* Plea, not guilty, and convicted. Objected, *insultum fecit* referred to one only of the defts. and uncertain which, so both could not be found guilty. Court held as a general rule, if an offence sufficient to support the indictment be well laid, it is well, though other facts be ill laid. Here *insultum fecit* might have been omitted and yet the indictment be good, for every battery (here well laid) includes an assault, though that does not a battery.

And East's  
C. L. 110.

§ 6. Though in a civil action where one part of the declaration is ill, and the jury find entire damages, the judgment must be arrested, as the court cannot apportion them; but on indictments the court sets the fine and will apportion it only according to those facts which are well laid. Hence, it is enough if a punishable crime be well laid in the body of the indictment, though all the facts intended as a part of it be not well alleged.

§ 7. *Uncertainty.* The charge must not only be positive, but certain as to every material fact; hence a charge in the disjunctive is bad, as *fabricavit seu fabricari causavit* a bill of lading. See Forgery. See Rex v. Foster, Ch. 205, a. 3, wherever a statute makes a circumstance material, it must be precisely stated in the indictment, as having a weapon first

5 Co. 121.—  
And Crown.  
C. C. 120.—  
Co. L. 303.—  
3 Mod. 202.  
—3 Salk. 191.

Rex v. Keate.—4 Com. D. 380.

drawn, it must be stated with certainty to bring the offence within the statute ; but certainty is to a general intent. CH. 218.  
Art. 7.

*But being surveyors &c.* is positive. See *Rex v. Boyall*, and other like cases. So *sciens* is a good averment. 2 Stra. 904, *Rex v. Sawly*.

Indictment for badly and negligently conducting himself in the execution of the office of constable, is too uncertain and general,—impossible for the deft. to know what he is to answer to. Same as to the case in which the indictment charged the defts., *de scriptis bonis et catallis* of *Davila decipiebant et defraudabant*,—deceived him of lottery orders. See *Rex v. Pappineau* ; where held, near the highway and near several dwelling-houses, is certain enough. Court cannot strike counts out of an indictment, being the finding of the grand jury. Indictment for words must specify what they are. See *Rex v. Holland*, post ; see *Rex v. Testick*, Ch. 213 ; also *Rex v. Gilbert*, Ch. 205 ; *Commonwealth v. Stow*, Ch. 213 ; *Same v. Bailey*, Ch. 213 ; *Same v. Stevens*, Ch. 213 ; *Same v. Smith*, Ch. 208 ; *Same v. Richards*, Ch. 143 ; *Same v. M'Monagle*, Ch. 212 ; *Same v. Ross*, Ch. 213 ; *Same v. Ward*, Ch. 212 ; *Same v. Knowlton*, 2 Mass. R. 530 ; *Same v. Tibbets jun.*, Ch. 204 ; *The People v. Franklin*, Ch. 213 ; *Same v. Kirley*, Ch. 218 ; *Same v. Pettit*, Ch. 204. Being an idle, lewd, disorderly person is well. 2 Burr. 864, *Rex v. Bootie*. Stroke laid to be on the left part of the side &c. is certain enough. 2 Cro. Hull's case. But a certain part of the water by deft. stopped is too uncertain. 2 Cro. 324, *Rex v. Sorel*.

§ 8. Every indictment must contain a complete description of such facts and circumstances as constitute the crime ; without inconsistency or repugnancy ; but except technical expressions words are to be taken according to their common acceptation. See *Surplusage*, Ch. 180, a. 8 ; also *Videlicet*, Ch. 198, a. 9. 6 East, 244.

§ 9. Wherever an evil intent accompanying an act is necessary to constitute such act a crime, the intent must be alleged in the indictment and proved, though enough to allege it in its prefatory part. But where the act is itself unlawful, the law infers an evil intent, and to allege it is but form and need not be proved by extrinsic evidence. (See part of this case, Ch. 204, a. 6.) The first case is where the act is in itself indifferent, but becomes criminal if done with a particular intent, there this intent must be alleged, for the law will not imply it. The second case is where the act itself is unlawful, there if done the law implies a criminal intent, and the proof of justification or excuse lies on the deft. In fact to make a crime there must be an evil intent in him who does the act, and this intent must appear either : 1. Where the law implies and 6 East, 264,  
*Rex v. Phillips*.

**CH. 218.** intends it, as it does in the doing of an act in itself unlawful and criminal : or 2. This intent must be alleged in some part of the indictment ; and must always be so alleged wherever the act in itself is indifferent and not criminal, as sending a letter to one, which may be lawful or unlawful according as the intent and purpose is of him who sends it ; lawful if he sends it intending to preserve the peace ; unlawful if he sends it meaning to produce a duel.

**5 D. & E. 607,  
Rex v. Hol  
land.**

§ 10. In an indictment against a public officer for a breach of duty, it is sufficient to state generally in the indictment he is such officer, shewing his appointment.

§ 11. When a duty is thrown on a public body, consisting of several persons, each is individually liable for breach of duty, as well for act of commission as omission.

§ 12. In an indictment against a servant of the East India Company for offences in India, it is enough to charge him with a wilful breach of duty, without adding it was corrupt.

§ 13. In an indictment against an officer for disobedience of orders, it is not necessary to aver that the orders have not been revoked, or that they are in force.

§ 14. Where a public officer is charged with a breach of duty, which duty arises from certain acts within the limits of his government, it is not necessary to aver in an indictment against him, that he had notice of those acts ; he is presumed from his situation to know them.

§ 15. Time and place must be added to every material fact in an indictment.

§ 16. But a charge in an indictment against an officer, of a breach of orders in not prosecuting a war "with all possible vigour and decision," is too uncertain, even though the charge be made in the very words of the order given to him, for such a charge communicates no intelligence to the deft. It is impossible, said Lord Kenyon, on this eleventh count, taking it alone, (and we must take it alone for this purpose) to divine what is meant to be proved. The deft. was one of the council at Madras, and the charges against him were for breach of duty as one of that council, yet those acts omitted which were the ground of this breach of duty could be done but by the whole council. The principle is seen in the eleventh rule.

**6 D. & E.  
619, Rex v.  
Mawbey &  
al.**

§ 17. In stating in an indictment the defts. produced a certain certificate in evidence which is false, it is not necessary to aver they knew it was false at the time of their conspiracy : it is enough that for such purposes they agreed to certify the fact as true, without knowing it was so.

**1 Bos. & P.  
180, 181, Rex  
v. Fuller.**

§ 18. If a statute make it felony to endeavour to seduce a soldier or sailor from their duty, in an indictment on such statute, it is sufficient to charge an endeavour to seduce &c., without specifying the means employed.

§ 19. And when the deft. is charged with endeavouring to incite B to mutiny, being a soldier, the deft's. knowledge of B's being a soldier is implied; and the word, *avowedly*, in such case is equivalent to *scienter*. CH. 218. Art. 7.

§ 20. If one material part of an indictment is repugnant to another, the whole is void. As if the indictment charge A with forging a writing, whereby B is bound to C, which is impossible if the writing be forged, or if the indictment be for disseizing A of lands, when it appears by the indictment he never had a freehold whereof he could be disseized. Crown C. C. 120; cites 2 Hawk. 228, 229.

§ 21. A *nolle prosequi* entered on an indictment is no bar to another indictment for the same offence. 2 Mass. R 172, Commonwealth v. Wheeler.

§ 22. One indicted for a riot and assault, if acquitted of the riot he is of the assault. 2 Salk. 593.

§ 23. Every indictment must ascertain and state the particular offences, otherwise no one can know what defence to make to an uncertain charge, nor can he plead it in bar or abatement to a subsequent prosecution; nor can it appear the facts given in evidence on the trial on only a loose general accusation, are the same as those of which the indictors have accused him; nor can it judicially appear to the court what punishment is proper for an offence loosely expressed or described; but a few exceptions exist to this rule, and none but to avoid much prolixity. 3 Bac. Abr. 101.

§ 24. It is not necessary in an indictment for receiving stolen goods, as a misdemeanor, to aver the principal has been before convicted. Such a fact is mere matter of evidence to be proved by the deft. See Commonwealth v. Andrews, Ch. 214. 6 D. & E. 83, Rex v. Baxter.

§ 25. *Vi et armis*. Place of these words is supplied in *rescue*, by the word *rescussit*. The indictment contained neither *vi et armis* nor *manu forti*, but held good, as the word, *rescussit*, implied it was done with force; and what is fairly implied the court will notice, and is as if expressed. So are implied in an indictment for a riot in the words, *riotose ceperunt, fregerunt, et prostraverunt*,—was for taking away two water engines. Cro. Jam. 345, Cramlington's case.

§ 26. *Forgery*. When an indictment charges a forgery committed to A's prejudice in uttering a forged bill or note, it need not state it was tendered to A, nor in what other manner he could be defrauded, though his name do not appear on the bill; for that is matter of evidence. 2 Stra. 834, Rex v. Wynd & al.

§ 27. *Description of the persons defrauded by a forgery*. Held, an indictment stating that a forged order was directed to Messrs Drummond & Company by the name of Drummond, is sufficiently certain. Objected the names of the partners should have been mentioned. But all the judges held East's C. L. 989, case of Elsworth.

East's C. L. 990, Rex v. Lovell.



CH. 218. the indictment good, and that they must understand the words as every body understood them.

Art. 8.

15 Mass. R.  
240, 242,  
Common-  
wealth v.  
Hall & al.

§ 28. Defts. were indicted for erecting on the common highway "a number of wooden sheds and buildings one hundred feet in length, and sixteen feet in breadth," and for continuing them there &c. whereby said way was and is greatly obstructed &c. Held, the way was described well enough; but that the description of said sheds was too loose in not stating what number. Judgment arrested.

ART. 8. *Bad language.*

2 Hale's P. C.  
169, 170.

§ 1. Where this vitiates the indictment or not. Regularly, bad Latin and so bad English does not vitiate the indictment, if yet it be reasonably intelligible. But if the words be words of art, and by omission or displacing of letters become insignificant, they vitiate the indictment, as *burgariter* for *burglariter*, *feloniter* for *felonice*, *murdredavit* for *murdravit*; but *burgulariter* has been held good. So if they make the indictment insensible or uncertain, as if A and B be indicted for stealing, *felonice cepit* &c. where it should be *ceperunt*, it shall be quashed.

4 Co. 40.

§ 2. Indictment for murder, and stated the mortal wound was given *circiter pectus*, and adjudged bad and uncertain.

1 Ld. Raym.  
609, Rex v.  
Lamb.

So if an indictment use a word that does not exist it is bad, as *magistratos*.

2 Ld. Raym.  
1094, Queen  
v. Scofield.

§ 3. The deft. was indicted for being a common scold, and the word, *riza*, was used in the indictment; bad, for the true word is *rixatrix*.

2 Ld. Raym.  
1394, Rex v.  
Shearing.

§ 4. So the indictment is bad, if in it there is used an improper word, *coloris brown* &c., speaking of cattle, when there might have been a proper word used, as *fuscus* or *subniger*. Thus the true Latin word for brown being omitted, the indictment is vitiated, and it is to be quashed. So the indictment shall be quashed if it have *apprenticus* for *apprenticius*, and *labourer* in addition for a *woman*.

And 1179,  
Queen v.  
Franklin.

1 Stra. 308,  
Rex v.  
George.

§ 5. So an indictment held bad, because it was *venerunt*, the jury in the preterperfect instead of *veniunt* in the present tense.

Lofft, 785.

§ 6. By the accidental omission of a letter in an indictment a sensible word is made insensible, this does not vitiate the indictment, though in the very gist of the charge, if the jury may be clear of the meaning. But it is otherwise, when one word having a meaning in the place, though improper and nonsensical is substituted for another, as a word having a meaning in its place, is not to be rejected.

2 Hale's P. C.  
170.

Abbreviations that are usual are allowable in indictments, as well as in other pleadings. But figures to express numbers

are not allowable in an indictment ; but numbers must be expressed in words.

CH. 218.  
Art. 9.

§ 8. *As to form.* This act provides that in any inquisition or indictment the words, *force and arms*, are not necessary &c. and that “no indictment for high treason, misprison of treason, murder, or other felony, or offence whatsoever, shall be quashed for the omission of any parish, town, villa, or hamlet within any county” in the State, or any objection after conviction &c.

Kentucky  
Act of Dec.  
26, 1798 ;  
Virginia law  
revised, s. 86,  
37.

ART. 9. *Name and addition of inditee.* § 1. Indictments in this respect must have precise and sufficient certainty. By statute 1 H. V. c. 5, all indictments must set forth the Christian name, surname, and addition of the estate, degree, mystery, town, or place, and the county of the offenders. But if one be indicted by a wrong christian name, surname, or addition, and he pleads not guilty or answers to the indictment by that name, he is estopped to plead misnomer. Hence, he that will take advantage of a misnomer of his christian name, or surname, or addition, must do it on his arraignment ; and the entry must be special, to wit : whereupon comes Robert Williams, who is indicted by the name of John Williams, and says, that whereas in the indictment it is supposed that one John Williams with force and arms committed the offence &c., whereas his name is Robert and not John : for if he says the aforesaid John comes, he concludes himself and cannot plead his name is Robert. The best way is, says Lord Hale, to allow the misnomer, and then the grand jury may immediately after indict him according to the name he gives himself.

4 Bl. Com.  
301, 302.

2 Hale's P. C.  
175, 176.—  
Crown C. C.  
107.

§ 2. If one be indicted without an addition, or a false one, and upon that indictment is outlawed, he may avoid the outlawry by a writ of error.

2 Hale's P. C.  
176.—Crown.  
C. C. 108.

§ 3. The addition, ought to be to the deft's. substantive name, not to the *alias dictus* only. And according to some authorities no addition is necessary to the name under the *alias dictus* ; and it also by some is said, that want of addition to the first name of one when several are indicted vitiates the whole ; but Hale says, it shall be quashed only as to him whose name is omitted, for they are in law as several indictments.

2 Hale's P. C.  
177.—2  
Hawk. 331.—  
Cro. El. 563,  
case of Fuss.

What are good additions or not, or doubtful. See Crown C. C. 108, 109, and many authorities there cited. A reputed degree is sufficient, as if called *gentleman* when in fact *yeoman*, but not *yeoman*, merchant, &c. when in fact a gentleman.

4 Com. D.  
375.—2 Inst.  
667, 678.

An indictment against inhabitants of a town for not repairing a way, is good, without naming each person in certain.

Crown C. C.  
109.

Addition of an occupation, as grocer, spinster, &c., is good ; but not of office, as it is uncertain a farmer, butler, servant.

4 Com. D.  
375.—2 Inst.  
668, 669, 670.

CH. 218. So of citizens, for it does not shew his degree or mystery ; nor  
 Art. 10. of heretic, vagabond, &c.—must be of one's highest degree.

2 Hale's P.  
 C. 177, 178.  
 —Crown C.  
 C. 110.

ART. 10. *Time.*

§ 1. The day and year of the fact committed must be inserted in the indictment. If the court set the 20th of May, and the indictment lay the fact the 10th of May last past, it relates to the day, and not to the month ; so for the words next ensuing. A was indicted for that he the first day of May &c. assaulted B, and him beat, and says not *then and there* ; but held well, for the *vi et armis*, day and place named in the beginning, refer to all the ensuing acts. But if A be indicted for that he the first day of May, and the second day of May, at D—, assaulted B, and then and there feloniously took a certain gown from him ; this indictment is bad, for it is uncertain to which the felonious taking relates.

2 Hale's P.  
 C. 178, 179.

§ 2. But in a capital case in favour of life, there must be a *then and there* to the stroke, or to the robbery &c. and the day and place of the assault is not sufficient. A is indicted for that he the first day of May, A. D. 1560, at C—, having a sword in his right hand, struck B, and not alleged *then and there* struck ; this indictment was quashed, because here the day, year, and place, relate only to the having the sword, and not to the stroke.

4 Bl. Com.  
 301, 302.—  
 Salk. 288.—  
 Co. El. 739.—  
 2 Inst. 318.—  
 3 Inst. 230.

§ 3. The time must be laid of the fact committed, but in general it is not material, provided it be laid previous to the finding of the indictment ;—but where the prosecution is limited to a certain time, the time may be material, and in murder the time of the death must be laid within a year and day after the mortal stroke given.

2 Hale's P.  
 C. 179.—3  
 Mod. 141.—  
 2 Haw P. C.  
 c. 46.—1  
 Hale's P. C.  
 361.—M'Nal-  
 ly, 341, 342.  
 —Kel. 16,  
 The King v.  
 Vane.—3  
 Inst. 230.—  
 2 Haw. P. C.  
 236, 236.—3  
 Bac. Abr. 106.  
 —1 Salk. 288.

§ 4. Though the day or year be mistaken in the indictment of felony or treason, yet if the offence was committed in the same county, though at another time, the offender ought to be found guilty ; but if there be any forfeiture of land &c. the jury of trials ought to find the true time of the offence committed. And if one be indicted not according to the true time of the fact committed, and acquitted, and is indicted again for the same offence, and according to the true time, he may aver it to be the same felony, and plead *auterfois acquit*. Where the time of the day is material to ascertain the nature of the offence, it must be alleged, as in burglary, “ in the night time,” “ or such a day, about the tenth hour in the night of the same day.” If the offence be laid on a day impossible, or on a day that makes the indictment repugnant to itself, or the same offence on different days, it is bad. If an indictment charge a man with an omission, as not scouring a ditch, it need not shew any time.

Crown C. C.  
 111.

§ 5. A mistake in not laying the offence on the very same

day on which it is afterwards proved upon the trial, is not material upon evidence. Time and place need not be repeated as to circumstances. If an offence be laid on one day, and proved on another, a party interested may falsify the verdict as to time, but not as to the offence, if it be general, *guilty*. 3 Inst. 230; Fost. 9.

CH. 218.  
Art. 11.

4 Com.  
D. 377.—  
M'Nally, 344.

ART. 11. *Place or venue.*

§ 1. So the town and county &c. in which the crime is committed must be expressed in the indictment. The place must usually be ascertained by naming the township in which the fact was committed, though in general the place is not material, if laid to be within the jurisdiction of the court; where the time must be repeated on the several acts done by the word *then*, regularly the place must be repeated by the word *there*. If there be before only the county in the margin, at D—— in the county aforesaid, is good, and relates to that in the margin; but if there be one in the margin, and another named before in the indictment; at D—— in the county aforesaid is bad, for the uncertainty to which it relates. Place of the stroke and death must be expressly laid in the county. 3 P. W. 439.

2 Hale's P. C. 180.—2  
Leach's C. L. 282.—4 Bl. Com. 301, 302.—M'Nally, 346.—2 Hale's P. C. 180.—Kelyng, 15, 33.—2 Hale's P. C. 291.—Cro. El. 738.—4 Com. D. 377.

§ 2. And it is a good exception to an indictment that it does not appear in it that the offence was committed in the county. If a fact done in one county be a nuisance in another, it may be indicted in either. So if A steal goods in one county, and carry them into another, he may be indicted in either, for it is theft wherever he carries the goods.

2 Haw. P. C. 220, 221; and ch. 46.—Cro. El. 910, Crisp v. Verral—Gumons v. Hodges.

§ 3. If an offence be laid *at the parish aforesaid*, and no parish is before mentioned, it is bad.

5 D. & E. 162, Rex v. Matthews.

§ 4. A servant received his master's money in the county of A——, and then denied to account for it in the county of B——, where he was called upon to account; held, he was indictable in the county of B——, for there is no evidence he converted the money to his own use but in that county. But where the place is a part of the description.

3 Bos. & P. 596, Rex v. Taylor.—M'Nally, 345.

§ 5. Munton was a government store-keeper in Antigua, and when resident there, transmitted false vouchers to his agent in London, and by him were delivered at the custom-house in London, the agent not knowing they were false. Munton was indicted in London, and convicted. On the same principle where one employs an idiot, who is an unconscious instrument of the crime, to murder another, the procurer, though absent at the time of the act done, is a principal. Indictment for an escape, place of arrest must be laid. Cro. El. 200.

6 East, 590, Rex v. Munton, A. D. 1793.—1 Burr. 646.—Foster's C. L. 106.—2 Haw. P. C. ch. 46, Bouche's case.

§ 6. As to stealing a horse in one State and carrying him into another, see the *People v. Gardner*, and the same *v. Schenck*.

2 Johns. R. 477.

CH. 218. Must be indicted in the State in which he stole the horse.

Art. 12. A robs and steals in the county of B—, and carries the goods into the county of C—, may be indicted there for the theft, not for the robbery.

Mass. Act,  
Feb. 15, 1796.

This act provides, if one be feloniously stricken or poisoned in one county in this Commonwealth, and die of the same stroke, poisoning, or injury, in another county thereof; an indictment found in the latter is valid. And if feloniously stricken &c. on the high seas, and die in one of said counties, the offender may be indicted in the county where the death happens. In capital offences the prisoner may peremptorily challenge twenty jurors.

ART. 12. *Description of the person killed &c.*

2 Hale's P.  
C. 181.

§ 1. An indictment for the murder of a certain person unknown, is good. So for stealing the goods of a certain person unknown, is good. So for an assault on one unknown; and if the party be convicted or acquitted, and afterwards indicted for the murder of such a person, by name, he may plead the former conviction or acquittal, and aver it to be the same person. There is no need of an addition of the person murdered or robbed &c. though if there be several of the same name, it may be convenient to state an addition by way of distinction.

2 Hale's P.  
C. 181.

§ 2. *Goods stolen &c.* If the goods of a parish church be stolen, the indictment shall be the goods of the parishioners of S. in the custody of the guardians of &c.

2 Hale's P.  
C. 181.

§ 3. If A have goods as the executor of B, and these be stolen, the goods of B, the testator, in the custody of A, his executor, or generally, "the goods of him the said A," is a good description. The indictment must suppose the winding-sheet stolen, the goods of the executor or administrator.

2 Hale's P.  
C. 181.

§ 4. If A deliver goods to B, a common carrier, and he is robbed, the indictment may suppose them the goods of A or the goods of B, at election; for B has a kind of special property in them, because chargeable for them to A.

2 Hale's P.  
C. 182.

§ 5. An indictment was quashed, because it was alleged the deft. feloniously took a certain piece of cloth of one J. S. but did not allege it was of the goods and chattels of J. S.

2 Hale's P.  
C. 182.

§ 6. So an indictment was held bad, because it alleged the deft. stole the goods of B, without shewing what in certain, as one horse, one ox, &c.—Same, that he stole sheep, without expressing the number.

2 Hale's P.  
C. 182, 183.

§ 7. So the value of the thing is usually expressed; but if one value be added to several articles, it is good, though most correct to add a value to each article;—good, if convicted of the whole,—but if convicted of part, *quære*. Indictment for

stealing twenty sheep, ewes and lambs, is bad, because it does not distinguish how many of each;—but twenty sheep generally is good. CH. 218. Art. 13.

§ 8. Generally the indictment ought to state the particulars that constitute the crime, and not charge one as a common champertor, conspirator, &c. But there are exceptions, as one may be indicted as a *common barrator, disturber of the peace, a sower of strife*, and a *common scold*, these words having acquired a *technical* meaning. In these cases indictments are good without stating particulars; but generally a bill of particulars ought to be filed. Crown C. C. 112, 118.

ART. 13. *Technical words.*

§ 1. In some cases words of art must, and in all cases the offence itself must be clearly stated, and with certainty. An indictment against A for feloniously leading away a horse, without saying *cepit et abduxit*, is bad, for he might have the horse by bailment. So that the deft. feloniously and carnally knew, without the word, *ravished*, is bad, though it concludes against the form of the statute. So *dedit mortalem plagam*, without the word, *percussit*, is bad. So in burglary it must be alleged, *broke and entered*; and *feloniously* and *burglariously*. And every indictment of felony must allege the fact was *feloniously* done;—of treason, *treasonably and against his allegiance*. A was indicted, and it was alleged he stole a horse, and held only a trespass, for want of the word, *feloniously*. 4 Bl. Com. 302. 2 Hale's P. C. 184.

§ 2. Some words of art cannot be supplied; as in murder, that he *of malice aforethought did murder*; in larceny, *feloniously took and carried away*. In murder, the length and depth of the wound must be expressed, that the court may see it was mortal. In murder and manslaughter it must be stated with what weapon the fact was done, and how; but if laid to be done with one kind of weapon, and another is proved, the indictment is supported; but not if one kind of death be laid and another proved, as death laid by poisoning, and death by shooting is proved, the indictment is not supported. Must shew in which hand he held the sword; but not essential to lay the value of the weapon. Ought to state particularly on what part of the body the wound was inflicted. If a wound be laid in one part, and another kind of wound be proved in another part, yet the indictment is supported. Though usual, it is not necessary, to allege the party stricken was in the peace of God, and of the king. It is material to allege the party wounded died of the wound, and the time and place, as well of the death, as of the wound given. Indictment for prison breach must shew the cause of imprisonment. 4 Bl. Com. 302.—2 Hale's P. C. 185, 186.—Crown C. C. 113, 114, 116.

CH. 218. § 3. In an indictment for forgery, "received," written for  
 Art. 14. "receiv'd," is not a material variance. 4 Com. D. 383,  
 Hart's case.

1 Caine's R  
 37

Indictment for a second offence, must state the record of the first, and conviction, if the punishment be increased. *The People v. Young.*

1 Caines' R.  
 131.

§ 4. So an indictment against an attorney for extortion, must state the fees legally due to him, and the excess, specifically. *The People v. Rust.*

ART. 14. *Contra formam statuti.*

In regard to this part of an indictment many cases have been noticed in the four preceding chapters.

2 Hal. P. C.  
 172, 173.

§ 1. A few cases will here be stated. A public statute need not be pleaded, but it is sufficient to conclude against the form of the statute in such case made and provided; for the court will take notice of a general statute. If a public statute be misrecited in an indictment, and concludes against the form of the statute aforesaid, it is *fatal*; but if it conclude generally, against the form of the statute in *such case made and provided*, it is good; for the court will take notice of the true statute, and reject the misrecital as surplusage. A statute continued is one and the same statute; so even if revised.

2 Hal. P. C.  
 188.—2 Cro.  
 627.—1 Salk  
 381.—4 Com.  
 D. 384.

*Contra pacem.* Every offence against the statute is against the peace, and ought to be so laid, and is bad without it; but an indictment need not conclude against the crown and dignity of the king, though usual. *Contra pacem* not essential as to a *nonfeasance*; but is if an unqualified person exercise a trade; 6 Mod. 128; is in barratry. Cro. Jam. 527.

2 Hal. P. C.  
 189, 190, 191.  
 —1 Saund.  
 134, notes.

If an offence be newly created, and made an offence of a higher nature, by statute, the indictment must conclude against the form of the statute, as for buggery, or rape, which before West. 2, was a trespass, yet being made felony by statute, the indictment ought to conclude against the form of the statute. But if an offence were felony at common law, and a special statute ousts the offender of some benefit, (the common law allowed him,) when circumstances are in the facts, though the body of such indictment must express the circumstances according as they are prescribed in the statute, yet the indictment must not conclude *contra formam statuti*; but yet such conclusion is only *surplusage*. If an offence be at common law, and also prohibited by statute, the indictment may conclude *contra formam statuti*.

And 5 D. & E.  
 162, *Kex v.*  
*Mathews.*

3 Bac. Abr.  
 114.—2 Hal.  
 P. C. 130.

§ 2. If an offence be only by statute, no judgment can be given on an indictment which does not conclude against the form of the statute.

2 Hal. P. C.  
 170, 171.—  
*M'Nally*, 339,  
 340.

§ 3. If a man be indicted for an offence, which was at common law, and concludes *contra formam statuti*, but in

truth it is not brought by the indictment within the statute, it shall be quashed. If an offence be at common law, also prohibited by statute with a corporeal or other penalty, yet it seems the party may be indicted, at common law, and then though it conclude not *contra formam statuti*, it stands as an indictment at common law, and can recover only the common law penalty, as in riots, &c.

CH. 218.  
Art. 14.

§ 4. A power is granted by statute, and the execution of the power is obstructed; and if this obstruction be indicted, it must be at common law, and the indictment must not conclude *contra formam statuti*; but must so conclude if for an offence created by statute.

Dougl. 441,  
446, Rex v.  
Smith.

§ 5. This indictment for using a trade was quashed, because it did not conclude *contra pacem*.

3 Salk. 190,  
Queen v.  
Lane.  
2 Ld. Raym.  
1034.

§ 6. Every indictment for a positive offence must charge it to have been *contra pacem*.

§ 7. *Contra formam statuti* aids any uncertainty not material.

4 Com. D.  
382.

§ 8. *Contra formam statuti* is not necessary where the offence is at common law, and the statute adds only a penalty.

4 Com. D.  
331.—Salk.  
460.

§ 9. *Contra formam statuti*. An indictment so formed, and on a statute, as on 5 Ed. VI. c. 4, for drawing his dagger &c., and not well laid to bring the case within the statute, is void; and there can be no judgment, at common law, the indictment being on the statute, is void at common law.

Cro. El. 231,  
Penhallo's  
case; cited  
M'Nally, 340.

§ 10. So one was indicted on 8 H. VI., as to disseizins, &c., and the statute was misrecited, so the indictment as on the statute; punishment moved for, at common law, as for an entry &c. into the land; but denied by the court, "for the indictment beginning with the statute of 8 H. VI., and concluding *contra formam statuti*, this can have no relation to any offence except upon this statute."

Cro. El. 231,  
307, case of  
Hall & al., &  
697.—Cro.  
Car. 465.—1  
Salk. 312,  
Bennet v.  
Talbot.

§ 11. If a statute adds a new penalty to an offence at common law, and the indictment concludes against the form of the statute, but does not bring the offence within it, it is good at common law, and the words, *against the form of the statute*, shall be rejected; but then it is conceived only the common law punishment can be inflicted.

1 Saund. 134,  
notes.—  
M'Nally, 340.  
—Dougl.  
441, 446.

§ 12. If an offence be created by statute, in an indictment for it, it is not sufficient to allege the same to have been committed *against the law in such case provided*; but it must, *against the form of the statute* in such cases made and provided. See *Commonwealth v. Springfield*.

11 Mass. R.  
279, 281,  
Common-  
wealth v.  
Stockbridge.

§ 13. If persons be indicted specially on the statute of stabbing, and the evidence be not sufficient to bring them within the statute, they may be found guilty of manslaughter at common law, and the words, *contra formam statuti*, be rejected

M'Nally, 340,  
Page's case.  
—5 D. & E.  
169.—Sayer,  
225.



CH. 218. as senseless, where the offence is committed at common law.  
 Art. 15. 2 Keb. 128.

ART. 15. *Other points relative to.*

9 Mass. R.  
 170, Commonwealth v.  
 Smith,

§ 1. The deft. was indicted for corruptly taking and receiving *usury*. And the court held, that after an indictment had been received and filed by the court, no objection of an irregularity in impannelling the grand jury, can be received as a plea to such indictment. *Quakers* are capable of serving as grand jurors. The objection to the regularity of the grand jury was, that one of them was a *quaker*, and this was pleaded in abatement after the bill found; and that he did not take the oath required by law. The replication to this plea was, that besides him there were nineteen grand jurors, and concurred in finding the bill. To this replication the deft. demurred. This decision as to quakers was founded on a late statute.

Mass. Act,  
 June 28,  
 1795.

§ 2. By the 4th section of this act neglect in putting up guide posts in the several towns in the Commonwealth, is made an indictable offence. Maine act, ch. 120.

Mass. Act,  
 Feb. 13, 1796.  
 —Maine Act,  
 ch. 106.

§ 3. By this act, if any person "wilfully and corruptly demand and receive any greater fee or fees, for any of the services aforesaid, (in the act,) than allowed by it, he forfeits \$30 for every offence, recoverable on indictment.

2 Stra. 849,  
 Rex v. Taylor.

§ 4. Indictment of one as a calumniatrix and common disturber of the peace, is too general and bad; though it adds, *ac litas, rixas, et pugnas movit et incitavit, &c.*

2 Ld. Raym.  
 790, Queen v.  
 Langley.

§ 5. An indictment does not lie against a person for entertaining *vagrants*; nor against one for being a vagrant; but a *barrator*, or *common scold*, is indictable by general words; but a vagrant may be bound to his good behaviour, at common law. 6 Mod. 240; 2 Stra. 1246, Rex v. Cooper.

Dougl. 240,  
 Rex v. Stratton & al.,  
 note.—Foster,  
 106, 106.

Another indictment pending is no good plea to a second indictment for the same offence, as it is to an appeal or *qui tam* informations. Nor will the court quash an indictment on the prosecutor's motion, but on the ground of insufficiency.

3 Salk. 187.

§ 6. Indictment for scolding quashed, because not said to be to the great disturbance of the peace, nor of the subjects. &c.

1 Salk. 385,  
 Regina v.  
 Cranage.

§ 7. If A be indicted for breaking the chamber of I, in the house of *James*, evidence it was in the house of *Jamson* does not maintain the indictment.

Stra. 1286.—  
 4 Com. D.  
 386.

§ 8. As to amendment of indictments, see Ch. 184, Ch. 185, Ch. 193; evidence by statute in some criminal cases, Ch. 91; and as to indictments, at common law, or on statutes, Ch. 196. Quashing an indictment on motion is not *ex debito justitiæ*,—not allowed after recognisance forfeited.

§ 9. By the 13th section of this act, every person held in prison on suspicion of having committed a capital crime, is to be bailed or discharged, if not indicted the second term &c. ; and shall be tried the first term, if they demand it, after indicted, unless he has enticed away the witnesses, or they are prevented attendance by some inevitable accident. CH. 218.  
Art. 15.  
Mass. Act,  
Mar. 16, 1785.  
—Maine Act,  
ch. 69, s. 44.

§ 10. An acquittal upon an insufficient indictment will not entitle a man to the plea of *autrefois*, acquitted to another indictment for the same offence. 10 Mod. 216.

§ 11. Though an indictment may be good for stealing the goods of one unknown, yet it must be proved at the trial they were the goods of some one, not the prisoner's, otherwise the law presumes them to be his. 8 Mod. 248.

§ 12. The deft. was indicted for a misdemeanor. Held, he could not plead over to the charge, after a plea in abatement, for a *misnomer*, on which issue was taken, and found against him ; the offer was, to plead not guilty after that issue was decided. 8 East, 107,  
Rex v. Gibson.

§ 13. Variance between the libel, or fact laid, and the one proved. *Tenor following*, means an exact copy. 2 Haw. P. C. ch. 56. But when on the substance is set forth of a libel, it is enough if the libel be proved to have the same sense as is stated. Id. 1 Stra. 816, *The King v. Hale* ; *Queen v. Drake*, Ch. 219, a. 4, s. 3 ; *Cro. El. 224*, *Ratcliff v. Shubley* ; *Cro. El. 503*, *Blisset v. Johnson* ; *Sir Ed. Walgrave's case*, Hob. 272. The variance is fatal, if the misplaced word, as "air" for "heir," be a complete word in itself, though it make no sense as it stands ; but if the word be a mutilated one, and makes no other word, as "abbey" for "abby," is the same sound and not a different meaning. So *Segrave* one, and the other *Seagrave*, no variance ; held, on the issue of *nul tiel record*. 2 Stra. 889 ; 1 Stra. 201, 231, 232, several cases ; and Ch. 219, a. 4, s. 3 ; 2 Salk. 660, 661, *Queen v. Drake*, nor for not ; *Hutton*, 56 ; *Cro. Jam.* 133, *Parker's case*, in reciting 5 El. of perjury, *admitteret* recited for *admittere*, variance fatal ; *Cowp.* 229, 230, *Rex v. Beach*. Indictment for perjury, variance in the word *undertood* for *understood*, not material ; but so held after the jury read *undertood*, *understood*. Indictment for perjury ; held, the words, "in manner and form following, that is to say," do not bind the party to recite the instrument &c. *verbatim*, nor render mere formal omissions, or mistakes, fatal. A word mis-spelt does not vitiate, if it remain the same word, and is not made another word, as "receiv'd" for "received." *Dougl.* 97. The word *aforsaid*, relating to a statute &c., ties the party down to an exact recital. 5 Johns. R. 1 ; 10 do. 443. M'Nally, 252,  
257.—2Saund.  
121.—Co  
Ent. 508.—  
Dyer, 203,  
Walgrave's  
case.—1  
Phil. Ev. 174.  
—2 Stra 889,  
Williams v.  
Ogle.—Parker's  
case.—  
Rex v. Beach.  
2 Ld. Raym.  
1515.—Bul.  
N. P. 292.—  
Dougl. 193,  
The King v.  
May.—Same  
v. Hart,  
M'Nally, 355.  
—Foster, 200.  
—1 Hale's P.  
C. 111, 115,  
291.

- CH. 219. § 14. No material variance, where assaulting and striking is  
 Art. 1. alleged, and assaulting and beating is proved in the warrant.  
 An insensible or nonsensical word inserted in the declaration,  
 setting out a writing may be rejected as surplusage. 5 Taun.  
 R. 187.

## CHAPTER CCXIX.

### PLEADINGS IN INFORMATIONS.

#### ART. 1. *General principles.*

§ 1. Informations are of three kinds : 1. Informations *qui tam*, see Ch. 143, some cases stated in prior chapters : 2. Informations *quo warranto* ; these have been considered Ch. 186 : and 3. Informations generally. In informations, the malfeasance is several as well as joint, and each of several defts. informed against may incur a forfeiture in proportion to his offence. Ch. 148, Ch. 153. Several general principles, in regard to them, are stated, Ch. 193, a. 33. Especially, informations by our constitutional laws are, in all cases, confined to mere misdemeanors. By the constitutions of individual States, and by an amendment to the constitution of the United States, they cannot be used where either capital or infamous punishment is inflicted. Informations, mere inquests of office, have been considered.

§ 2. Having already considered so many branches of informations ; and these being thus limited to mere misdemeanors, and to offences, none of which can be capitally or infamously punished, or, in other words, to offences punished by fines, or, at most, common imprisonments, it will not be necessary here to treat of informations very largely.

Cowp. 672 to  
 689, Rex v.  
 Horne, A D.  
 1777.

§ 3. The essential parts of an information appear in this great case for seditious words uttered by Horne. It gives the court to understand, and be informed, that John Horne, of &c., being a wicked, malicious, seditious, and ill disposed person, and being greatly disaffected to the king &c., and to his government &c., and wickedly, maliciously, and seditiously, intending &c., to stir up and excite seditions &c., and to alienate &c., their affections, fidelity, and allegiance, &c. and to insinuate, and cause to be believed, that divers of the king's

CH. 219.  
Art. 1.

innocent and deserving subjects, had been inhumanly murdered by his majesty's troops in the Province of Massachusetts Bay, in New England, in America, belonging to the crown of Great Britain, and unlawfully and wickedly, to seduce and encourage the said majesty's subjects, in said Province, to resist and oppose his majesty's government, on (June 8, 1775,) at ———, with force and arms, wickedly, maliciously, and seditiously, did write and publish, and cause and procure to be written and published, a certain false, wicked, malicious, scandalous, and seditious libel, of and concerning his said majesty's government, and the employment of his troops, according to the tenor and effect following: "*King's Arms Tavern, Cornhill, June 7, 1775.* At a special meeting this day of several members of the Constitutional Society, during an adjournment, a gentleman proposed that a subscription should be immediately entered into, (by such of the members present, who might approve the purpose,) for raising the sum of £100, to be applied to the relief of the widows, orphans, and aged parents, of our beloved *American* fellow subjects, who, faithful to the character of Englishmen, preferring death to slavery, were for that reason only inhumanely murdered by the king's (meaning his said majesty's) troops, at or near Lexington and Concord, in the Province of &c., on the 19th day of last April; which sum being immediately collected, it was thereupon resolved, that Mr. Horne, (meaning himself, said John Horne,) do pay, to-morrow, into the hands of &c., on account of Dr. Franklin, the said sum of £100, and that Dr. Franklin be requested to apply the same to the above purpose.

JOHN HORNE." (Meaning himself, the said John Horne.) In contempt of our said lord, the king, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like cases offending, and also against the peace &c. Many other counts were added. This information contains generally the outlines of every information; but, as in the cases of indictments, the description, the particular crime charged, is varied according to the special case, and often so may be the introductory part.

The court and House of Lords held, that the above information was well drawn; and that the words, "*of and concerning,*" were a sufficient introduction of the matter contained in the libel, and a sufficient averment that it was written "*of and concerning the king's government, and the employment of his troops.*" It was stated in this case, by the court, that "it is the duty of the jury to construe plain words, and clear allusions to matters of universal notoriety, according to their obvious meaning, and as every body else who reads must un-

CH. 219. derstand them." And the deft. must prove they were "used in a different or in a qualified sense;" "if no such evidence is given, the natural interpretation of the words, and the obvious meaning to every man's understanding, must prevail."

Art. 1.

The words of  
& concerning,  
how essen-  
tial, 4 Maule  
& S. 168.

And "the military department is one branch of the government;" then to charge the *military* with criminal conduct is to charge the government &c. Another rule admitted, that "evidence is not to supply any defect in an information." See *Inuendo*. And "the court and jury must understand the record as the rest of mankind do." And the king's troops "can be employed, as troops, by the act of government only." If they act as individuals they are not employed as his troops.

4 Bl. Com.  
126.

§ 4. It has been stated, that compounding information upon penal statutes, is an offence in criminal cases, and also it is said of an equivocal nature, an additional misdemeanor against public justice, by contributing to make the laws odious to the people.

§ 5. It has been observed, some informations are, in fact, *qui tam*, partly at the suit of the king, and partly at the suit of the subject, as is usually the case where the fine or penalty is to be divided between the public and the informer or prosecutor; and that informations also are general, strictly at the suit of the public alone, and also in name at the suit of the public alone, but yet carried on at the relation of some private person or common informer. There are several distinctions in England as to informations, which do not exist here, and in that country they may be filed for many high offences, infamously punished; but not as to any here so punished; and they seem there to be allowed on account of some enormous misdemeanors, as to the prosecution of which any delay is dangerous; but no such reason is known in our practice, for extending the use of informations, which bring persons to the bar of the court to answer for crimes at the will and pleasure of the Attorney General, or, in England, in many cases, of the master of the crown office; whereas, on the principles of indictments, persons cannot be brought so to answer but on the finding of a grand jury, under oath. And there can be no doubt, but that indictments, generally, are far more in conformity to the spirit of our system of government and laws, than informations are; hence, in Federal proceedings, they have been but little resorted to, and but rarely used in the State courts. It is said at the will and pleasure of the Attorney General &c. for it is stated by Blackstone &c. that when these crown officers are sufficiently assured that a man has committed a gross misdemeanor, against the peace of the government, they are at liberty, without waiting for any further intelligence, to file informations and carry on prosecutions; on which alone, of course, the accused are brought to answer

4 Bl. Com.  
306.—12  
Med. 398.

to the offence charged in the information. This however is the principal difference; for it is well observed, that after the information is filed, the same notice is given to the deft., the same trial by jury had, the same pleas allowed, the same judgment given, as where the prosecution is by indictment. But this was never the case in the court of Star-Chamber; which heard and decided according to their own discretion, on informations filed.

CH. 219.  
Art. 2.

§ 6. "Information is also a suit for recovering monies, or other chattels, or for obtaining satisfaction in damages for any personal wrong committed in the lands or possessions of the crown;" here, of the State &c. This differs materially from an information for a public offence.

3 Bl. Com.  
261, 262.

§ 7. There are also informations *in rem*, where goods are supposed to become the property of the public, and no one appears to claim them; as wreck &c. seized by a public officer for public use, on which seizure an information must be filed, and notice to the owner, if any exist, to come and claim the property,—and a commission of appraisement ought usually to issue. See Ch. 148, Debt for Penalties, Statutes *qui tam*, &c. where the principles on which penalties are recovered are largely considered.

§ 8. Though an information is often a suit to recover a fine or penalty, yet it differs materially, in some respects, from an action, as debt &c., to recover the same, for the action is the informer's action, and if he fails he must pay costs to the deft. Plt. may be non-suited, and the Attorney General cannot enter a *noli prosequi*, but for the king's, or state's, part. But otherwise as to an information. So the action against several is *quasi* joint. But an information, on penal statutes, for forfeitures incurred by malseasances against several, charging them as several; as Ch. 148, Hill & ux. v. Davis & al. exrs.

1 Com. D.  
316.

Informations on. Massachusetts act of June 19, 1788, how local, &c. see Ch. 148.

§ 9. Generally, in stating offences and pleadings in informations, the same rules are to be observed as in cases of indictments. And for this reason, and because informations have been viewed as extraordinary remedies, we find not much in the English law books, and but little in our own, respecting them especially, except those *qui tam*, and those in the nature of a *quo warranto*, a species of suits often instituted to settle disputed rights among individuals.

ART. 2. *Where an information lies.*

§ 1. *For oppression, against justices.* The Court of King's Bench granted an information "against the defts. as justices of the peace for the borough of Penryn, for refusing to grant Burr. 653, not if they act innocently.—For libels, see Ch. 207; and Holt on Libels, 261, 273.

3 Burr. 1317,  
Rex v. Davis,  
Rex v. Wil-  
liams.—But 2  
Libels, 261,

CH. 219. licenses to the publicans who voted against their recommendation of candidates for members of parliament for that borough." Art. 2.

They had acted very grossly, having previously threatened to ruin these people by not granting them licenses, if they voted against the candidates these justices proposed; and afterwards did actually refuse them licenses upon that account only. And Lord Mansfield said, the court did grant this information against the justices, not for merely refusing to grant the licenses (which they had a discretion to grant or refuse, as they should see to be right and proper,) "but for the corrupt motive of such refusal; for their oppressive and unjust refusing to grant them," because these persons would not vote as the justices wished them. Like case, 3 Burr. 1716, *Rex v. Hann & al.*

1 Wils. 7,  
*Rex v. Jones.*

§ 2. This was a rule to shew cause why an information should not go against the deft., a justice of the peace, for demanding 1s. of J. S. brought before him, and which he demanded as due to him for what he called discharging a warrant, and on J. S's. refusing to pay the deft. imprisoned him. The court would have granted the information if the fact had been so. See *Smith & al. v. Dovers*, *Basset v. Godschall & al.*

1 Wils. 7,  
*Rex v. Norman.*

§ 3. An information was granted against an attorney, a commissioner to take affidavits in B. R. on an arbitration, for examining persons *ore tenus* upon oath, without putting the matter in writing. This too seems to have been on a rule to shew cause why an information should not go.

1 Wils. 111,  
*Rex v. Watson & al.*—  
Like case, 4  
Burr. 2106.

§ 4. In this case an information was granted against the defts., overseers of the parish of Dorton, for procuring one Vine, a soldier, to marry a poor woman chargeable to the parish of Dorton. The soldier had a settlement in the parish of Brill. She was an idiot, and the defts. gave the soldier about £15 to marry her.

1 Wils. 22,  
*Rex v. Vaughan.*

§ 5. See also, information, *Rex v. Wait*; and 1 Wils. 22. This was an information against Vaughan, an attorney, for getting one Morgan, an outlawed felon, arrested on a judge's warrant and taking of him £200 to let him go. Fined £500, and six months' imprisonment.

3 Salk. 172,  
*Rex v. Marsh.*

§ 6. *Information for forgery.* The deft. was a coroner and took an inquest of murder, and the jury in English found only one Marsh guilty, and the deft when he engrossed the indictment in Latin added two other names. Proved by the oaths of two of the jury. Deft. fined.

2 Stra. 1216,  
*Rex v. Clarke.*

§ 7. The deft., as a justice, committed a felon and they let him to bail, and he did not appear, and for this an information was granted against the justice.

1 Stra. 21,  
*Rex v. Fox.*

§ 8. So an information was granted against a justice for

voluntarily absenting himself from the sessions, and held good, as the court could not be held without him. CH. 219.  
Art. 2.

§ 9. If a magistrate be guilty of mal-practices during the term, the court will grant a rule nisi for a criminal information at the end of the term against him, but not for any misconduct before the term. 7 D. & E. 80,  
Rex v. Smith.

§ 10. A rule had been granted calling on the deft., a justice of the peace, to shew cause why an information should not be exhibited against him, for having improperly convicted one; the conviction having been quashed, the party applying for the information charged the deft. with very gross misconduct; but it was refused, unless he would make an exculpatory affidavit denying the fact. 3 D. & E. 388,  
390, Rex v.  
Webster.

§ 11. See the case, *The King v. Delaval*, as to the female apprentice, 1 W. Bl. 439; *Rex v. Benfield*, 2 Burr. 980. And several may be joined in one information.

§ 12. Information for a false return of a corporation to a *mandamus*. A *mandamus* went to this company to choose officers; they made a return under their common seal. Rule moved for and granted, to file an information against some particular persons of the company for that return. Held, the court must proceed by information; for being a matter of public government no particular person is so concerned in interest as to maintain an action, and the information must be granted against particular persons, though the return be under their common seal, for there is no other way to try the right; if found for the king, there must be a peremptory *mandamus*. 1 Salk. 374,  
Rex v. Surgeons' Com-  
pany.

§ 13. Information was moved for against a printer for printing a ludicrous account of a marriage between an actress and a married man—allowed, though stated this paragraph was taken from another paper, the printers of which were informed against; also stated, this printer (def.) had in his next paper voluntarily made a public recantation. But the court said it was high time to put a stop to this intermeddling in private families. 1 W. Bl. 294,  
Rex v. Kin-  
nersly.

§ 14. The deft. was captain of a sloop of war, and had pressed captain Wager of a merchant ship, to serve as a common seaman. Information granted. Though pressing may be lawful in national emergencies, yet Webb exceeded his power and acted maliciously. 1 W. Bl. 19,  
Rex v. Webb.

§ 15. Information granted against papers published to prejudice a cause. Lofft, 466.

§ 16. An information was granted against the deft. for endeavouring to procure an appointment of certain persons to be overseers, an act indifferent in itself, but done with an intent to derive a private advantage from such appointment to himself. Here the criminality lay in the intention. 1 East, 154,  
Rex v. Jollif.



CH. 219.  
Art. 2.

4 East, 164,  
Rex v. Brisac  
& Scott.

§ 17. Held, that an information at common law lay for a conspiracy between the captain and purser of a man of war, for planning and fabricating false vouchers, to cheat the crown, (which planning and fabricating were done on the high seas) is well tried in Middlesex, upon proof there of the receipt by the commissioners of the navy of the false vouchers, transmitted thither by one of the conspirators through the medium of the post, and the application there by a third person, a holder of one of such vouchers, (a bill of exchange) for payment, which he there received. The court seems to have gone on the ground, that conspiracy may be tried "wherever one distinct overt act of conspiracy is in fact committed." And even if this overt act be done by one of them in pursuance of the common purpose, (and Rex v. Bowes & al.) the offence may be there tried. But in this case the court held, that the false vouchers being delivered by an innocent person in the county, he was a mere instrument of the defts., and then his delivery was that of both of them, and so in the county both were guilty of part of the conspiracy.

§ 18. For more informations, see Cutts, in error, v. Commonwealth, 2 Mass. R. 284; and Commonwealth v. Waterborough, 5 Mass. R. 257.

4 Com. D.  
397.—1 Vent.  
293.—2 Stra.  
834, Rex v.  
Woolaston.—  
2 Stra. 788,  
Rex v. Curl.  
—2 Mod. 302.  
—East's C.  
L. 5.—3 Kel.  
607.

§ 19. An information lies by the common law for every crime which tends to the subversion of the state, as for blasphemous words,—“for religion is the cement of society.” And writing against Christianity in general is punishable at common law; but this does not include disputes between learned men on controverted points. So it lies for printing and publishing an obscene book;—so it lies if a man omit a thing some statute commands to be done, or does any thing prohibited by statute.

8tra 1167,  
Rex v. Tay-  
lor.

Information lies for keeping a great quantity of gunpowder, as for a nuisance.

8 Mod. 114,  
Rex v. May-  
or of Ten-  
terden.

§ 20. This was an information granted against the mayor of Tenterden, for taxing men who did not live in the corporation. The right was in question, and the court directed this matter to be tried in an information: 1. Because a single person might not be able to contest this matter with a whole corporation in an action: 2. Because “if a verdict should pass for or against such single person, it would not end the contest which might happen against the rest.”

8 Mod. 119,  
Rex v. The  
County of  
Surry.

§ 21. On a rule for an information against the inhabitants of the county for not repairing a bridge, it was alleged a certain parish was bound to repair it; and held by the court, that an information lay and was the true remedy, and “the only way to try the right.” “The county is *prima facie* to repair it.” 2 East. 342; Ch. 79, a. 12.

3 Salk. 359.

§ 22. The dispute was about the election of a mayor of the corporation, and informations were granted against both parties for bribery. 8 Mod. 186, *Rex v. Mayor of Tiverton*. CH. 219. Art. 2.

§ 23. Motion for leave to file an information against the deft., allowed, a scholar about fifteen years old at a school, for assaulting, beating, and challenging, second master of the school, who reproved the deft. for something he did in the school. 8 Mod. 283, *Rex v. Sir Charles Hol- loway*.

§ 24. Leave was given to file an information against several plate button-makers, for combining by covenants not to sell under a set rate. And Holt said, it was "fit that all confederacies by those of a trade to raise their rates should be suppressed." 12 Mod. 248.

§ 25. Leave was given to file an information against one for offering to buy votes, in order to elections of parliament. 12 Mod. 314, *Rex v. Tay- lor*.

§ 26. An information was granted against a clerk in chancery for sending writs into the country with soft yellow wax put upon them without being sealed. 12 Mod. 355.

§ 27. A statute making a river navigable, directed that no more wharfs be built upon it; deft. after built one, and the court allowed one having a former wharf and prejudiced by this new one to file an information against the deft., because contrary to a private statute which was for the public good; but held, no information lay for a private injury. 12 Mod. 398.

§ 28. Leave granted to file an information against the deft. for inveigling away the plt's. wife, and procuring merchants &c. to sell her goods in order to saddle the husband with the debt., agreeing with the seller to deliver him the goods again. 12 Mod. 454, *Pocock v. Thornicroft*.

§ 29. A frivolous complaint for an information was made against a justice of the peace, the attorney and complainant held to pay costs. 2 Burr. 154, *Rex v. Field- ing*.

§ 30. For keeping an unruly bull in a field, Crown Circuit Assistant, 361.

§ 31. For making hartshorn in a building erected near a public street, Cro. C. Ass. 368;—for engrossing grain, Herne, 495;—for forestalling the market, 1 Browne, 230.

§ 32. Against a tenant for years for not repairing a highway, 1 Brown, 232;—for keeping a gaming-house, 237.

§ 33. By the party grieved against the deft. for publishing false reports, Ras. Ent. 359;—for unloading goods without paying the duties, 409;—for intrusion, 412;—plea and replication, 412, 414.

§ 34. For usury, Ras. Ent. 689; Co. Ent. 394; *Veteres Intrationes*, 224;—against one who leased lands on a pretended title, Ras. Ent. 333.

§ 35. Against several for riotously breaking and entering a dwelling-house &c. Tremaine's P. C. 178;—for a forcible

CH. 219. entry on tenant for years, 191 ;—so into a freehold, 192, Art. 3. 194.

§ 36. For cheating under pretence of buying goods, for cheating with false cards at whist, and false dice at passage, Trem. P. C. 91 ;—with false dice at hazard, 93 ;—for giving a bill with a forged acceptance, to one for a debt due, 103 ;—against a dyer for selling goods not well dyed, and with a counterfeit mark, 106.

Dougl. 87,  
271.—Holt  
on Libels,  
266 &c.—6  
D. & F. 294.  
—3 Burr.  
1564, Rex v  
Phillips & al.

§ 37. Rule as to granting informations on the principles of English practice, adopted in several States, not granted of course but in the sound discretion of the court as to libels. And several rules,—one is, not to grant an information unless the prosecutor will by affidavit deny all the specific charges in the libel ; when one is moved for, the court views itself in the place of a grand jury, and requires such evidence as will support a bill of indictment. Informations filed *ex officio* by the attorney-general, stand on their own ground. In crown cases the court will not grant leave, as he has a right to file them *ex officio* ; and he may, if he thinks proper, cite the parties to shew cause why one should not be exhibited : it is not a case within the 4 & 5 of W. & M. c. 18,—was for trying to influence the jury in Wilkes' case.

Dougl. 229.

§ 38. As to quashing informations so filed *ex officio*. The court will not give leave to do this, as the attorney-general, as he may enter a *nolle prosequi*, and file another. Further cases where informations have been granted or refused by the court, Stra. 498 ; Andr. 229 ; Lofft, 273.

ART. 3. *Where an information does not lie.*

2 Mod. 299,  
Attorney  
General v.  
Read.

§ 1. Where a statute makes a thing a nullity, as the office of a justice of the peace not so and so qualified, no information lies, or is necessary. And the general principle is, that a disability by statute ought to be removed by the party, to enable himself to execute an office ; and he is punishable for not removing the disability, as excommunication, where in his power to do it, and so to receive the sacrament in England.

4 Com. D.  
399.—2 Stra.  
918, Rex v.  
Baxter.

§ 2. Lies not for facts committed on the high seas, for an information is local.

2 Stra. 1130,  
Rex v. Ford.  
—Stra. 498.

§ 3. Nor does it lie for not collecting money on a brief for fire, as it is of a private nature, and a penalty is given, and a method to enforce it : nor for a libel where the contents are true.

1 Burr. 316,  
Rex v. Han-  
key.

§ 4. *Sending a challenge.* Rule to shew cause why an information should not be grauted, discharged, for the court understood by the letters of the parties, that the prosecutor first challenged, and that the deft only accepted ; and though strictly there might be cross-informations against both, yet, as

the prosecutor was the first aggressor, the court said, there was no reason for giving him this extraordinary remedy by way of information ; but ought rather to leave him to his ordinary remedy, by action or by indictment. CH. 219.  
Art. 3.

§ 5. An information for perjury was denied, because the question was unfair ; held, on motion for an information ;—the question tended to draw from him an answer that might have involved him in bribery. 2 Salk. 374,  
Rex v. Dummer.

§ 6. An information is not proper to be granted in the case of every poor person ; and generally an information is not proper for trying a civil action, especially if the parties do not refuse a trial at law. And the court will not grant an information in any case of felony, nor by our law, in any case, of an *infamous* punishment. Loft, 155,  
253.

§ 7. And it is a well settled rule, that an information will not be granted to a party in any case, unless he comes with pure hands. Loft, 72,  
Rex v. Eden.

§ 8. Nor will the court ever aid a complainer in an extraordinary way, where he has been obliged to do the justice he should have done of himself, though not regularly obliged, and has been the cause of the act complained of, and it does not appear to have been done *malò animo*. Loft, 174,  
Rex v. Jackson.—1 D. &  
E. 663.

§ 9. Motion for an information against them, four persons, overseers and justices, for refusing to put a substantial household-er on the poor's rate &c., but refused, " as they were acting in a court of record, with powers entrusted to them by the constitution ; the court said, it must be a very strong case indeed, with flagrant proofs of their having acted from corrupt motives, that would warrant a rule for an information. The court will not grant an information on doubtful evidence. 1 W. Bl. 432,  
Rex v. Jus-  
tices of Sea-  
ford.  
Loft, 64.

§ 10. If an information be moved for under false or ambiguous colours, the court will not grant it ;—nor where the words admit a favourable interpretation ; or where the party complaining comes late ; or where he is equally chargeable ; or is too poor to bear the expense ;—nor where the matter is not of importance for public example in an extraordinary manner. Loft, 393,  
Frideaux v.  
Arthur.

§ 11. On motion for a criminal information against the deft., mayor of a borough, for returning to a writ of *certiorari*, the conviction of a party in another and more formal shape than that in which it was at first drawn up, and of which a copy had been delivered to the party convicted by the magistrate's clerk ; the conviction returned, being warranted by the facts ; the court refused the information ; for it was not only legal, but also laudable, thus to correct the drawing up of the case ; and never an information granted, if the magistrate act honestly. 1 East, 186,  
Rex v. Bar-  
ker.

§ 12. A rule to shew cause why an information should not 1 Burr. 546,  
Rex v. Peach  
& al.

Cn. 219.

Art. 4.



1 Burr. 541,  
Rex v. Robin-  
son.—Stat. 5  
W. & M. c.  
18.—Holt on  
Libels, 264.  
—Show. R.  
106.

be granted was discharged, because it appeared clearly the prosecutors and defts. were all a parcel of infamous cheats and gamblers; but the court left them to their action or indictment against their brethren in iniquity.

§ 13. Motion for an information against the deft. for attempting to bribe at an election, where there was no opposition. Lord Mansfield C. J. said, informations at common law were filed by the coroner, who did it upon application, as matter of course. The statute therefore was made to limit it; and this court limits itself: 1. As to the persons applying, they may be so circumstanced as not to be entitled to this aid: 2. The application may be unreasonably delayed: 3. The suspicious state of the case: 4. The consequences of granting the information. These principles applying to this case, the motion was denied.

1 W. Bl. 18,  
Rex v. Lord  
Vane.

§ 14. The court refused an information against a husband for endeavouring to retake his wife, contrary to articles.

1 D. & E. 653,  
Rex v. Jack-  
son.

§ 15. It is a general principle, wherever a magistrate acts uprightly, though he mistakes the law, no information will be granted against him.

2 D. & E. 190,  
Rex v.  
Brooks.

§ 16. But if a justice of the peace discharge one not dischargeable by law, from illegal and corrupt motives, the court will grant an information against him.

#### ART. 4. *Proceedings in informations.*

2 Haw. P. C.  
262.—3 Bac.  
Abr. 169.

§ 1. In the English practice there is a reasonable distinction between those informations filed in the name of the attorney-general alone, which are admitted of course, and those moved at the request of private persons. In this last case it is a rule not to admit any to be filed without first making a rule on the persons complained of, to shew cause to the contrary. This rule is never granted but upon motion made in open court, and grounded upon some affidavit of a misdemeanor committed, which, if true, doth either for its enormity, or dangerous tendency, or other such like circumstances, seem proper for the most public prosecution. And if the person on whom such rule is made, having been personally served with it, do not, at the day given him for that purpose, give the court good satisfaction, by affidavits, that there is no reason or cause for the prosecution, the court generally grants the information, and sometimes upon special circumstances, will grant it against those who cannot be personally served with the rule; as if they purposely absent themselves. But if he can shew good cause to the contrary, as that he has been indicted for the same offence, and acquitted, or that the intent is to try a civil right, not yet decided, or that the complaint is trifling or vexatious &c., or that the thing has been long acquiesced in, or that it is of a private nature, and does not

See informa-  
tions for pub-  
lishing a  
libel, 4  
Wentw. 407,  
410, 414, 417;  
against a jus-  
tice for fraud,  
in taking  
sureties &c.  
418 to 424;  
was at com-  
mon law  
against jus-  
tices for mis-  
conduct in  
discharging  
a vagrant,  
424, 430.

concern the public, the court will not grant the information. In 1693, an act was passed in England, to restrain informations, and to subject prosecutors to security and costs; holding them to prosecute such their informations to effect, and to abide the orders of the court thereon. But this act was confined to informations filed by the coroner or master of the crown office. This act has not been adopted here. But this act includes a *quo warranto* information.

CH. 219,  
Art. 4.

§ 2. Another prosecution depending cannot be pleaded in abatement to any other but a *qui tam* prosecution. The court does not give leave to quash one filed by the attorney general.

Dougl. 240,  
Rex v. Strat-  
ton.—1 Salk.  
372.

§ 3. If an information for a libel differ in one word from the libel itself, the information is bad; as *nor* for *not*. And 2 Salk. 660, 661; on tenor &c., 8 Co. 78. Usually a party applying for an information must waive his right of action.

3 Salk. 224,  
Queen v.  
Drake.—  
2 D. & E. 198,  
Rex v. Spar-  
row.  
6 D. & E. 224,  
Rex v. Wil-  
let.

§ 4. A made affidavit that B brought him a challenge from C, and that B had refused to make an affidavit that C sent him with it. This is not evidence on which the court will grant a rule nisi for a criminal information against C, for sending a challenge. A's affidavit not legal evidence.

If on a rule  
to shew  
cause why an  
information  
should not be  
filed, and the  
def. be pre-  
vented at-  
tending by  
adverse  
winds &c.,  
one filed will  
be set aside,  
1 Caines' R.  
194.  
8 Mod. 58,  
59, Rex v.  
Sparling.

§ 5. General rule in this case. The court said that in these cases they were placed in the room of a grand jury. That if a bill of indictment were preferred before such jury, this affidavit &c. would not be evidence against the deft., "and that this court could only grant an information on evidence that would support a bill of indictment."

§ 6. Information on 6 & 7 W. c. 11, against profane cursing and swearing; and quashed because it did not state the deft. was not a servant, labourer, common soldier, or sailor, and so not within the exceptions of the act; and because the oaths were not specified in the information;—though objected it belonged to the deft. to shew he was a servant, labourer, &c.; and *quare* if this be not the modern principle.

§ 7. In this case, held not necessary to aver in the information that the deft. was not under sixteen years of age, and that he was not a servant, common labourer, soldier, or sailor; only those above sixteen punishable.

8 Mod. 366,  
Rex v. Tuck.

§ 8. Information granted against the deft. for pretending to be bewitched &c.

12 Mod. 556.

§ 9. See this important act as to proceedings on informations, Ch. 148, and Ch. 153; limiting penal suits by informers to the county, and one year &c. This statute has reference to a great number of statutes passed from time to time, by each of which the process by information is expressly given, either to the informer alone, or to him and the Commonwealth &c. One year in Kentucky in all cases except those of life or limb.

Mass. Act,  
June 19,  
1788.—  
Maine Act,  
ch. 59.—Act  
of Kentucky,  
Feb. 26,  
1798, s. 46.

## CH. 219.

## Art. 5.

2 Stra. 1074,  
Rex v. Sol-  
gard.—2 Ld.  
Raym. 1377,  
Rex v.  
Plympton.—  
1 Stra. 21.—  
Kentucky  
Act, Feb. 26,  
1798.

§ 10. Other cases of informations ;—for a captain of a ship refusing to let a coroner come on board ;—for procuring a female apprentice to be assigned for the purpose of prostitution, though by her consent, 2 W. Bl. 239 ; 3 Burr. 14, 34. For bringing persons to vote at a corporation election ;—against a justice for any improper official conduct, 9 East, 358 ; 1 Wils. 7 ; 2 D. & E. 190. As to elections &c. see 4 East, 337 ; 4 D. & E. 381 ; 5 D. & E. 85 ; 1 Stra. 637 ; 2 Ld. Raym. 1409 ; 3 D. & E. 596 ; Cowp. 59, 75 ; 2 D. & E. 767, 771 ; 4 D. & E. 223. In Kentucky no information can be filed for a trespass or misdemeanor, but by the court's express order, and the fine or amercement there is assessed by a jury.

ART. 5. *Coroners' inquisitions.*

1 Bl. Com.  
34.—3 Salk.  
100.—East's  
C. L. 378,  
386.—1 Hale  
424.—2 Hale  
58.—2 Haw.  
ch 9. s. 23.  
—Suicide,  
Ch. 215, a. 5.  
s. 7.

When he is a ministerial officer, see Ch. 75, a. 2, and Ch. 75, a. 8, his power to serve process, and liabilities ; no power now to appoint a deputy. The coroner was an ancient officer at common law, ordained (with the sheriff,) to keep the peace. In England chosen by the freeholders. By Westm. 1. none but lawful and discreet knights could be chosen. By our constitution, coroners are appointed by the governor, by advice and consent of council. By Westm. 1. c. 9, the coroner is a conservator of the peace, in relation to all felonies. But our coroners have but few powers by the common law ; their powers are principally given, and their duties enjoined by State statutes ; and these bear but very little resemblance to the numerous important powers and duties of the coroner in the ancient laws of England. By these ancient laws, the coroner took appeals, and held his court of record ; inquired of treasure trove, wreck, &c. and was answerable to the king for several branches of his revenue ; he received the appeal of the approver of felony, and his confession of it before him was not traversable ; so he took the felon's abjuration, nor was this, so taken, traversable ; so he inquired of breach of prison, and the offender's confession of this before him was not traversable ; he had many other powers and duties appertaining to his office, none of which belonged to our coroners. In fact the only considerable powers and duties of the ancient English coroners, transferred to ours, seem to be those which relate to inquisitions taken on the bodies of persons slain, or found suddenly dead. The provisions of certain ancient English statutes, on this subject, have been re-enacted in ours. By this statute, the coroner, when certified of the case, was bound to go to the place where any was slain, or suddenly dead, or wounded, and to collect his jury from several of the next towns, at a certain place, and by their oaths inquire if they knew where the person was slain, whether in a house,

4 Ed. I. de  
officio coron.—  
Hale's P. C.  
170.—4 Inst.  
271.—1 Salk.  
377.

field, bed, tavern, or company; who was guilty, or who was present, men or women, and of what age, whether slain, where found, or brought thither, and how, &c. &c. And all times the coroner has made his inquisition, *super visum corporis*, otherwise void; and therefore if the body be interred before his coming, it shall be dug up, unless it has been long buried. It is an indictable offence to bury the body before or without sending for the coroner. To dig up a dead body for inspection is discretionary with the court. His bond need not be formally approved by the Common Pleas. 14 Mass. R. 167.

CH. 219.

Art. 6.

Salk. 377.—  
Stra. 22, 538.

ART. 6. *Massachusetts statutes as to these inquisitions.*

§ 1. The office of coroner does not appear to exist in the United States statutes, nor did it in Massachusetts Colony government; but in that by a statute of 1641, "whenever any person shall come to any sudden, untimely, or unnatural death, some assistant, or constable of the town, shall forthwith summon a jury of twelve discreet men, to inquire of the cause and manner of their death, who shall present a true verdict thereof, to some near assistant, or the next county court, upon their oath."

Mass. Colony  
Laws, 96.

§ 2. This act, relating to the office and duty of a coroner, directed coroners to take inquests, on dead bodies, very nearly in the same manner prescribed in the next act, passed March 12, 1784.

Mass. Act,  
A. D. 1700.

§ 3. This act (the Provincial act of of 1700, revised,) enacts, that coroners serve writs &c., as stated Ch. 75, and adds, "they shall take inquests of violent deaths committed, and casual deaths happening, within their respective counties, and shall, before they enter upon the duties of their office, be sworn to the faithful discharge thereof, and give security before they proceed to act, in the same manner sheriffs, by law, are obliged to do.

Mass. Act,  
March 12,  
1784.—  
Maine Act,  
ch. 93.

§ 4. Section 2 enacts, "that each coroner shall, as soon as he shall be certified of the dead body of any person supposed to have come to his death by violence or casualty, found, or lying within his county, make out his warrant, directed to the constable of the town where the dead body is found, or lying, or to the constables of one or more of the three or four next adjacent towns, requiring them forthwith to summon a jury of good and lawful men, of the same town or towns, sufficient to make up eighteen in all, to appear before him at the time and place, in such warrant mentioned and expressed." The act then prescribes the form of the warrant to the constable. The warrant expresses that the jury is to inquire upon the view of the body, there lying dead, how and in what manner he came to his death. The act then directs the manner in which the constables must execute the warrants. The coroner swears



CH. 219. the jury, twelve or more, diligently to inquire and true presentment make, on behalf of the Commonwealth, how, and in what manner, A B, who lies here dead, came to his death,"

Art. 6.

and to deliver to the coroner a true inquest thereof, according to the evidence, &c. The act then directs the charge the coroner shall give to the jury, upon their oaths, to declare of the death of the person, whether he died of felony, or of mischance, or accident; and if of felony, who were principals, and who were accessaries, with what instrument he was struck or wounded, and so of all prevailing circumstances, which may come by presumption; and if by mischance, or accident, whether by the act of man, and whether by hurt, fall, stroke, drowning, or otherwise; to inquire of the persons who were present, the finders of the body, his relations, and neighbours, whether he was killed in the same place where he was found, and, if elsewhere, by whom, and how he was brought from thence; and of all circumstances relating to the said death; and if he died of his own felony, then to inquire of the manner, means, or instrument, and of all circumstances concerning it." The jury stands together, and witnesses are procured by the coroner's warrant. The act prescribes the form of the witnesses' oath. Their evidence is put in writing, and subscribed by them; and if it relate to the trial of any person concerned in the death, the coroner recognises the witnesses to appear at the next Supreme Judicial Court in the county, there to give evidence &c., and commits those who refuse so to recognise. The coroner must make a return to the court of his inquisition, written evidence, and recognisance by him taken. The act then directs the form of the verdict to be under the hands and seals of the jurors, and the conclusion of it, according to the case, if murder, or self-murder, or by misfortune, or if innocently by the hands of any person, the verdict to conclude in a prescribed form, accordingly. And if, on the inquisition, the death be found to be by the felony or misfortune of another, he must speedily inform some justice of the county, that the person killing &c. may be arrested &c.

§ 5. It will be observed, that this act does not direct any inquiries to be made, that have any relation to any forfeitures of property; nor did our former statutes on this subject. But the inquiries are directed solely to ascertain the facts of the case relating to the death of the person found dead, to learn how he came by his death, and who, if any, are guilty. Nor does the coroner or his jury inquire of any flight particularly, though no doubt the fact of a flight may be inserted in this verdict. It will also be observed, the coroner and his jury are directed, by this act, to inquire *super visum corporis*, and

at the very spot. But if one is found guilty of the murder, the coroner does not commit him, nor inquire concerning lands, goods, and chattels, as is done in England; but he gives notice to some justice, as above, that he may arrest the murderer.

CH. 219.

Art. 7.

ART. 7. *The force and effect of this inquisition.*

§ 1. It has already appeared, in Blackbourn's case, Ch. 215, that this coroner's inquisition may be used as evidence in the trial of the murderer on his indictment. See 1 Phil. Ev. 298, 299; 3 D. & E. 713; Bul. N. P. 242.

§ 2. But it is said, that if the coroner neglect to take an inquisition, other jurisdictions may do it, but that their inquisitions, as well as his, are *traversable*. In this case the jury found, "that the mare of the deft. was the cause of the death of W. S., and was of the value of £10; but it was not a coroner's jury.

1 Burr. 18,

19. Rex v.

Killinghall.

§ 3. A coroner's inquisition, like an indictment, ought to be certain, state the wound &c. accurately, and that the party died of it. It is a misdemeanor to bury the body before the coroner's inquest is taken; and the coroner may cause the body to be dug up soon after buried; but not at a great distance of time.

Salk. 377.

§ 4. "An inquisition of office is an act of a jury summoned by the proper officer, to inquire of matters relating to the crown, upon evidence laid before them, some of these are in themselves convictions, and cannot afterwards be traversed or denied, and therefore the inquest or jury ought to hear all that can be alleged on both sides. Of this nature are all inquisitions of *felo de se*, of flight in persons accused of felony, of *deodands*," &c.

4 Bl. Com.

298, 299.

"Other inquisitions may be traversed afterwards, and examined, as the coroner's inquisition of the death of a man, when it finds any one guilty of homicide; for in such cases the offender so presented, must be arraigned upon this inquisition, and may dispute the truth of it, which brings it to a kind of indictment.

§ 5. If a presentment be *super visum corporis*, that A killed B and fled, this presentment of the flight is held not traversable, but conclusive to forfeit the goods, though he be after acquitted of the felony.

2 Hale's P.

C. 154.

§ 6. An inquisition, *super visum corporis*, is not traversable. See 2 Lev. 140; 5 Com. 148. But in this case of Bond, the court refused to file a coroner's inquisition, finding the party *felo de se*, and his message forfeited; because on testimony produced, the inquisition was not believed, being on a view of the head only. And it is too late to take up a body after it has been buried seven months.

Carth. 72.

Stra. 22,

Rex v. Bond.

CH. 219.

Art. 7.

5 Com. D.  
148, 149.—  
Stra. 261.—  
Stra. 167,  
Rex v. Saun-  
ders.—Stra.  
533.—3 Mod.  
80, 228.

§ 7. And the court will quash his inquisition if there be evidence of his misconduct, as refusing evidence &c. 3 Mod. 80; 1 Vent. 182, 352. And quashed if the year in the caption be in figures; and after quashed, he shall take a new one, (1 Salk. 190,) by leave of the court *super visum corporis*. The court will make a rule to take up the body on the first inquisition being quashed. On a misdemeanor in the coroner or jury, a *melius inquirendum* shall be granted as the court may direct. 1 Salk. 190; 2 Lev. 141, 152.

§ 8. If an inquisition find a man *felo de se*, it may be traversed. 1 Vent. 239, 278; 2 Jon. 198; 2 Vent. 152; 5 Com. D. 149.

Carth. 72.

§ 9. And a *melius inquirendum* not being *super visum corporis* may be traversed. 2 Lev. 141.

13 H. IV. 3.  
—13 H. IV.  
13—6 Co  
109.—Dyer,  
238—3 Kel.  
366, 564.

§ 10. Formerly it seems the coroner's inquisition of deaths was in very high credit, and if *super visum corporis*, it found that J. S. fled, though afterwards acquitted both of the felony and flight, yet he forfeited his goods; "for, said the old books, the coroner's inquest is so solemn that it is not traversable." "Also, when the goods are once lawfully vested in the king by that inquest, the property of them cannot be divested."

1 Bac. Abr.  
496.

§ 11. So it is said the coroner's record of an abjuration, or of the confession of breaking prison, or the confession of a felony by an approver, estops the party to traverse the confession, or to say he is not the same person, if the coroner's inquisition find that he is the same; yet it is said in these cases the judge has a discretion to inform his conscience, and therefore to take an inquiry of the people living next the place of the whole circumstances of the matter.

1 Bac. Abr.  
496; cites  
Brooke  
Corou. 151.  
—2 Lev.  
141, 162.—  
2 Kel. 859.—  
2 Jones, 198.  
—Vent 278.  
—2 Stra. 68.

§ 12. "Also, it is holden in some books, that an inquest of self-murder found before a coroner cannot be traversed; but the contrary opinion being also holden by books of as great authority, and seeming also to be more agreeable to the general tenor of the law in other cases, it seems to be the better opinion, that such inquest being moved into the King's Bench by *certiorari*, may be there traversed by the executor or administrator of the person deceased, or, in case the coroner's inquest finds him to have been a lunatic, by the king

§ 13. Thus vague and uncertain are the old English books as to the force and effect of a coroner's inquisition; whether conclusive, or traversable or not. Some, as 1 Burr. 19, &c. say generally, it is traversable;—some generally, that they are not traversable. But most of the English books make distinctions, as will be observed in the cases above cited; they seem generally to admit his inquest is not conclusive as to the offender accused of the death and brought upon his trial; and strange indeed would it be if such a sudden, imperfect, and

generally *ex parte* inquiry; as this inquest, should be conclusive. CH. 219.  
Art. 7.

§ 14. But it is in many books said, this inquisition is conclusive and not traversable, which finds the deceased *felo de se*; which finds one's flight and forfeiture of his goods thereon; and which, 3. finds one's confession of a fact, as breach of prison &c. However, these findings may have been or now are in England, it is clear they ought not to be conclusive in our practice, but traversable, for the following reasons: 1. The ancient cases in England are not much to be on relied on here; for the ancient inquests and records of the coroner in these cases were different from ours, inasmuch as they depended on many ancient statutes giving them validity, never in force here; also, on the high credit of the coroner's court, and inquiries in ancient times;—also, on a third circumstance, the Court of King's Bench, the supreme coroner of England, after making inquiries as to the truth and validity of the coroner's inquisition, either quashed it, and ordered another or not, according to circumstances, or accepted and recorded it. In this last case it had the sanction of this court. Neither of these circumstances exists in our practice.

§ 15. 2d. Modern inquisitions in England are differently viewed. Hence, Hawkins says, the opinion that a flight and forfeiture found are conclusive, is harsh and unreasonable; and hard that a man shall be liable to forfeit all his goods, which may perhaps be all that he is worth, by an inquest taken in his absence, without either hearing him or giving him an opportunity to defend himself. In this Hawkins' opinion is agreeable to all the sound rules and principles of evidence; and it may be added, these inquiries by coroners and their juries in these cases of sudden deaths &c., are necessarily the work of the moment, and no time is allowed to get distinct evidence, and the law does not bring before the coroner and his jury any proper parties to make a thorough investigation of facts. Before them there is neither a prosecutor nor deft., nor issue joined to which to apply the evidence. 2 Hawk. P.  
C. 64.

§ 16. 3d. As to suicide, the modern English authorities according to Bacon, are, that such inquisition finding one *felo de se* may be traversed by his executor &c., and for the above and other reasons he well observes, that these modern authorities are most agreeable to the rules of evidence in other cases. And as to the confession, above stated, it seems this inquest is not so conclusive, but that the judge or court may inquire of neighbours as to the truth of the facts, and so call in question the coroner's inquisition.

§ 17. 4th. The forfeiture of goods for a flight seems to be an arbitrary principle of law in England in favour of the

CH. 219.

Art. 7.



monarch, established in feudal times,—a principle never adopted in our law; and we never have had any such forfeiture. And if our legislators had deemed the flight of the supposed offender material to this purpose, they would unquestionably have made it an express part of the coroner's charge to his jury. But neither flight nor goods are mentioned in the charge directed by our statute to be made.

§ 18. 5th. This inquisition in our practice has not been deemed conclusive, but traversable. For instance, in Blackburn's case, above stated, Ch. 215, there was a coroner's inquisition finding murder, but Blackburn was indicted by a grand jury, as our constitution required, and tried by the traverse jury in the same manner he would have been if there had been no such inquisition. The court in the trial went into all the original evidence. The same was done in the case of Cato Haskel, above stated. Though the coroner's inquisition was returned as our statute directs to the court, yet in the trial no regard was paid to it, as proving or disproving the fact of murder or manslaughter. But the court in the trial examined all the original evidence, as well that which was before the coroner and his jury, as the other evidence; and the coroner himself was examined as a witness in the trial as to all the facts within his knowledge, including those that came to his knowledge when he took the inquisition.

§ 19. 6th. But though it is conceived this inquisition of the coroner is traversable in all points; that is, it is not conclusive of itself upon any in our court, yet it in fact has operated conclusively in practice on one point, that is, where the inquisition finds the deceased *felo de se*; because as in the law of 1641, when this was found, the deceased was immediately buried in the ignominious manner pointed out in the statute of 1660, that is, "in the common highway &c. with a cart load of stones laid on his grave, as a brand of infamy, and as a warning to others." And our statutes have continued to inflict infamy in some such manner on the suicide to the present time, though as observed, Ch. 215, these statutes have not been executed in many cases since the American revolution. But so far as they have been executed and the suicide has been thus branded, the finding of the jury of inquest of death has been final in practice, for the brand of infamy being once fixed immediately on finding of the verdict, and the body so buried, because the deceased has been so found *felo de se*. No case is known in which friends have interposed and pursued measures to obtain any thing like a reversal of such inquisition. There has been no plain process in the State to this purpose; and as death by self-murder has not been attended here with forfeiture of property as in Eng-

land, the question, if the deceased was insane or not, killed himself or not, never has arisen in any questions concerning property. Hence the inquest finding the deceased *felo de se*, or guilty of wilful self-murder, has in practice ever been final as to this mark of infamy, not because this inquisition is in its nature not traversable. And a case so strong may happen in which this inquest may find one a self-murder unjustly, that the relations of the deceased, his executor &c. may hereafter, on the inquisition being returned into the Supreme Judicial Court, as by law directed, move to have it quashed or set aside, for some defect in it, for some partiality, or because not true, in order to remove this brand of infamy.

Ch. 220.  
Art. 1.

Cro. Jam.  
636, Oily's  
case.

§ 20. This inquisition has sometimes been called an indictment. The inquiry was in this case before the coroner, *super visum corporis* of Oily, who had shot himself, and found he did it in *furor et insania* whereof he died; and this was called an indictment, and being removed into the King's Bench by *certiorari* it was discharged, because a vicious indictment: 1. Because in the caption of this indictment the jurors were not said to be good and lawful men of the county: 2. Because this indictment did not state that the deceased struck himself. This was done on the motion of the attorney general; and the reason seems to have been, often in England, this inquisition finding the deceased murdered by another, has itself been deemed an indictment or accusation, on which alone the accused has been brought to trial. This cannot be the case in our practice for reasons already stated.

## CHAPTER CCXX.

### PLEADINGS IN CRIMINAL CASES.

#### ART. 1. *Process of commitment.*

§ 1. This, in criminal cases, is to several purposes, as to arrest or apprehend offenders. See Arrests, Ch. 65, treating of escapes, rescues, &c.; also Ch. 172, treating of false imprisonment &c., where it was proper to consider what an arrest, and when legally made or to be made. Process as to bringing the party in to answer before some court or magistrate; this is included in arrests, commitment, and bail. Process in regard

CH. 220.

Art. 2.

to bail, has been considered, Ch. 150, in treating of suits on bail-bonds and recognizances. Process as to commitments, in regard to the principles thereof, has been considered, Ch. 193, in forming a synopsis in pleadings, and will now be more in detail. Wherever an offender is arrested on a *capias*, or warrant for any offence, he is brought before some court or magistrate, to be dealt with according to law; that is, he is brought immediately to the bar of the court, or before the magistrate, for trial, and put to plead; or he is bailed as stated, Ch. 150; or he is committed, as preparatory to his trial;—of course, all not brought to trial immediately, or bailed, are committed for safe custody. So wherever one is by judgment of court, or otherwise, to do a certain thing, and to be held in custody till he shall do it, if only to find surety of the peace, or to pay costs, he must be committed, in criminal cases, until the thing is done; and this whether he neglect or refuse to do what he is ordered or adjudged to do, or not. It must always appear in the commitment or *mittimus*, for what cause the offender is committed, for several reasons;—and the gaoler who refuses to receive him may be indicted.

2 Haw. P. C.  
116, 117.—  
10 H. IV. 7.  
—10 Ed. IV.  
17—20 Ed.  
IV. 6.—7 Ed.  
IV. 20.—1  
Bac. Abr.  
377.

It is also a general rule, that wherever a constable or private person may legally arrest, and for felony or treason, he may commit him to the common gaol; and every private person has as much authority in cases of this kind, as the sheriff has, or any other officer, and may justify such imprisonment by his own authority, but not by command of another. But this must be understood as to the *private* person, in regard to the case in which *he knows* treason or a felony to be committed by the party, and where, therefore, such private person is bound to arrest, if he can; and not in regard to a case in which he only *suspects* the party to be guilty, and is not bound to arrest, and eventually the party is found not guilty, for in such case the arrest and commitment *on suspicion* are void.

1 Bac. Abr.  
378.

§ 2. But at this day it is clearly best for a private person, according to modern practice, when he arrests one for felony, to bring him before a justice of the peace, who can commit or bail, according to the nature of the case.

#### ART. 2. Examination.

§ 1. Whenever a man is accused of any offence and arrested, he ought to be seasonably brought before some magistrate or court, enabled by law to examine into his case, in order to see if he ought to be discharged, or forthwith tried, or bailed, or committed, as in every such case one of the four things ought ever to be done in due time. But in every such case the law allows a reasonable time for the examination; and it has been decided, on common law principles,

Savage v.  
Tateham,  
Cro El 829.  
—2 Haw.  
119.—2  
Hale's P. C.  
191.

that a justice of the peace may detain a prisoner, in order to examine him, three days, as being a reasonable time, but eighteen days were deemed too long a time, and judgment against the justice. CH. 220.  
Art. 2.

§ 3. When the prisoner is brought before the justice, he is to be dealt with according to law; and if no cause of commitment appears, he must be discharged, on examination of the case. If the case be bailable, the justice must let him to bail. But though bailable, if he have no bail, he must be committed till he shall find it, and being either bailed or committed, he is not to be discharged till he be convicted or acquitted, or otherwise legally delivered. The examination of the accused is not on oath, but that of the witnesses and accusers is on oath, and they must be bound to appear at the proper court, whenever the accused is held for trial. But all the examinations of the accused, accusers, and witnesses, ought to be put in writing, as they may be of use, and often material on the trial. And being sworn to by the justice or justices, as in Blackburn's and other cases, to be truly taken, they may, as in that case, be given in evidence against the offender at his trial, and no doubt also for him, so far as they are in his favour. And in order to do this properly, the justice may for a reasonable cause, *by word of mouth*, command the constable or officer, or any other person, to detain in custody the prisoner till the next day, and then to bring him before the justice for further examination; and this detaining is justifiable by the constable or any other person, without shewing the particular cause for which he was to be examined, or any warrant in writing. These temporary detentions are of necessity, and are an exception to this statute, which provides, "that none be imprisoned by justices of the peace, save only in the common gaol." And according to Lord Hale, if the prosecutor and witness, examined in writing before the justice, die before the trial, or are unable to travel, their evidence on it may be used against the prisoner so taken, if the justice swear it was truly taken. No case to this effect is recollected in our practice.

§ 4. And before the justice commit the prisoner, he binds the prosecutor to prefer a bill of indictment, and also to give evidence. But if he be not the accuser, but one unconcerned, or if the offender be before the justice after indictment found, as he often may be, then the justice binds over the prosecutor only to give evidence at the offender's trial &c., and if he refuse in either case, he may be committed by the justice.

§ 5. If a prisoner be brought before a justice of the peace, expressly charged with felony by the oath of a party, the justice cannot discharge him, but must bail or commit him.

1 Hale's P.  
C. 583, 584.  
2 Hale's P.  
C. 120, 124.

Broughton v.  
Malshoe,  
cited from  
Moore, 408.

5 Hen VIII.  
—9 Co. 119.  
—See Ch.  
220. a. 6, s.  
3, 4.

1 Hale's P.  
C. 581; and  
cases cited.

2 Hale's P.  
C. 121.



CH. 220. But if he be charged only with *suspicion* of felony, yet if  
 Art. 2. there be no felony at all proved to be committed; or if the  
 fact charged as a felony, be in fact no felony in point of law,  
 the justice of the peace may discharge him; as if a man be  
 charged with a felony for stealing a parcel of the freehold, or  
 for carrying away what was delivered to him &c., for which,  
 though there may be cause to bind him over as for a trespass,  
 the justice may discharge him as to felony, because it is not  
 felony. But if a man be killed by another, though it be *per*  
*infortunium*, or *se defendendo*, which is not properly felony,  
 or in making an assault upon a minister of justice in the exe-  
 cution of his office, which is not at all felony, yet the justice  
 ought not to discharge him, for he must undergo his trial for  
 it, and therefore he must be committed, or at least bailed,—or  
 by our law he may be clearly bailed. 15 Mass. R. 277. Where  
 A is committed for dangerously wounding B, A is to be re-  
 tained in prison, without bail, until it shall appear B's life is no  
 longer in danger.

1 Stra. 263,  
 Rex v. Whit-  
 lock.

2 Stra. 934.  
 —1 Bac.  
 380, 381;  
 cites 2 Inst.  
 591.—2 Haw.  
 P. C. 119.—  
 8 Co. 100.—  
 9 Co. 87.—  
 Dalt. c. 118.  
 —Dalt. c.  
 125.—Palm.  
 550, 558.—  
 Rol. R. 220,  
 245.—2  
 Hale's P. C.  
 122, Sand-  
 ford's case.

1 Bac. Abr.  
 381; cites  
 Skin 596,  
 Rex v. Row.  
 —Salk. 347.  
 —2 Hale's P.  
 C. 123.

§ 6. If power be given to a justice to commit for want of a  
 distress, it is enough the warrant state it is certified by the  
 constable that there is none. The warrant must specify  
 the gaol. Warrant of commitment, see Warrant of Arrest,  
 Ch. 217. The warrants to commit to prison, or *mittimus*, like  
 other warrants, must be under hand and seal, and of course in  
 writing, and shew the authority of him who makes it, and  
 time and place of making, and must be directed to the keeper  
 of the prison. It may command the gaoler to keep the party  
 safe and in close custody, for this being what he is obliged to  
 do by law, it can be no fault to command him to do it. It  
 ought especially to state or describe the crime with certainty  
 to a common intent, otherwise the officer is not punishable  
 for an escape; because he has no legal *mittimus* to enable  
 him to hold the prisoner. And if the *mittimus* do not correctly  
 describe the crime, the court before whom he is removed by  
*habeas corpus*, ought to discharge or bail him. This rule holds  
 not only where no cause at all is expressed in this warrant of  
 commitment or *mittimus*, but also where the crime is so  
 loosely stated, that the court cannot judge whether there was  
 a reasonable ground of imprisonment or not; as where one  
 was committed for *manifold contumacy*, for refusing to answer  
 certain articles, or for insolent behaviour and words spoken at  
 the council board. And since the *habeas corpus* act has been  
 in force, the particular crime ought to be expressed in this  
 warrant, not only the treason or felony, but also the particular  
 kind of treason or felony; because when the offender is  
 brought before a proper court, on *habeas corpus*, the court  
 cannot know what to do with him, when his crime is not thus

properly described in the *mittimus*, for that is the warrant on which this writ of *habeas corpus* proceeds, and the court can understand the offence but as it is described in that paper; and if a court commits, by order entered on record, as it may, this order ought to be equally certain; and in either case, this certainty is necessary to enable the gaoler to make a list of his prisoners, for the inspection of the court, and so to enable the judges particularly to know what kind of criminals are in the prison. Though convenient, it is not necessary, to name the justice in the beginning of the warrant, for his seal and subscription sufficiently designate him, and the omission may be supplied by an averment that it was done by such a justice. See Ch. 193, a. 30.

CH. 220.

Art 3.

Though safest, yet it is not necessary, to state the accused was charged on oath. 1 Bac. Abr. 381. A commitment in execution must state the party has been convicted. See *Burford's case*, 3 Cranch, 448; a warrant of commitment must state a good cause certain and supported by oath.

2 Hale's P.  
C. 123.—6 D.  
& E. 609.

ART. 3. *Conclusion of this warrant must always be suitable to the case,*—to this purpose see several cases, Ch. 193, a. 30.

§ 1. Sometimes the conclusion that the party be kept till further order, meaning the further order of the law, or to the like effect; and if the party be committed only for want of bail, it seems to be a good conclusion of the commitment that he be kept till he find bail. But a commitment till the person who makes it shall take further order, is not good. But the party so irregularly committed may be bailed. But the omission of these words in a *mittimus*, "*until he be delivered by due course of law,*" makes no nullity in a justice of the peace's warrant, for they are no more than the law implies,—many cases cited. So a commitment grounded on a statute ought to conclude in conformity to it; as where a statute directs a party be committed till he accounts, so ought the conclusion of the *mittimus* to be, and for the want of such a conclusion the party will be discharged.

1 Bac. Abr.  
381.—2  
Hawk. P. C.  
120.—2 Inst.  
62, 591.—  
2 Hale's P.  
C. 124.—  
Dalt. c. 124,  
125.

§ 2. The statute was, that the offender be committed, until he shall answer unto the questions, and he was in fact committed, there to remain until he shall be from thence discharged by due course of law. He was discharged for this defect.

Carth. 291,  
Yaxley's  
case.

§ 3. So in his case it was not stated who made the complaint and oath, so that if there was perjury the party accused would have no remedy. And he was prosecuted on a statute or statutes, and it was deemed a material defect in the warrant of commitment, that the statute on which prosecuted was not pointed out. Nor did the warrant shew that Baxter was

1 Bac. Abr.  
382, case of  
Baxter.

CH 220. guilty of any offence against the statute supposed to be referred to at all.  
 Art. 3.

1 Bac. Abr.  
 284.

§ 4. If a person be committed on a bare suspicion, without any indictment for a supposed crime, where afterwards it appears that no crime was committed; as for the murder of a person thought to be dead, who afterwards is found to be alive, it has been held he may be safely dismissed, without any further proceedings; for that he who suffers him to escape is properly punishable only as an accessory, where there can be no principal, and it would be hard to punish one for a contempt founded on suspicion appearing in so uncontested a manner to be groundless.

4 Bl. Com.  
 297.

§ 5. The imprisonment made on this commitment before trial being only for safe custody, and not for punishment, in order to bring the prisoner to trial to ascertain if he be guilty or not, he ought to be treated with humanity, and not with any unnecessary severity. He ought not to be loaded with needless fetters, "though what are so requisite must too often be left to the discretion of the gaolers." "The law will not justify them in fettering a prisoner, unless where he is unruly or has attempted an escape."

2 Hale's P. C.  
 123 — And  
 see 3 Maule  
 & Sel. R. 203,  
 206, but the  
 conclusion  
 may be read  
 with the  
 body of the  
 warrant; and  
 331.

§ 6. Though Lord Hale thinks the above things requisite and fit in a warrant of commitment, as the true cause, the justice's committing, the date, the apt conclusion, &c.; yet he is far from "thinking the warrant void that hath not all these circumstances." "And therefore, if the conclusion of the *mittimus* be, to detain him till further order by the justice, it is true it is an unapt conclusion, and therefore binds not up the hands of the justice to whom it may belong to bail or deliver him, as the case shall require; but the commitment is notwithstanding good, if there be any tolerable certainty in the body of the warrant for what it is, as for felony generally, though the particular is best to be expressed." Regularly the commitment is to the common gaol of the county. "If the prisoner be bailable, yet the justice is not bound to demand bail, but the prisoner is bound to tender it, otherwise the justice may commit him." So of a sheriff who has taken a man by *capias* where he is bailable. Relief on *habeas corpus*; see *Habeas Corpus*, also. Ch. 193, a. 31.

Collins' case  
 &c.

§ 7. *Habeas corpus*. This writ has been several times noticed in connexion with false imprisonment and other matters; but as it has also an intimate connexion with the subject of this article, *commitments*, it may be well to consider it a little further on general principles. Cases in which it avails not by reason of the peculiar ground of commitment. If a member of the house of commons be committed for a breach of privilege, he cannot be discharged on this writ during the ses-

sions; though the writ was issued to bring up Crosby from the tower, committed on the speaker's warrant; for "the House of Commons is a supreme court of judicature with respect to its own privileges, and especially over its own members;" and this court never discharges persons committed for a contempt by any Supreme Court. The law has committed to these the power of judging of their own contempts in the last resort. Prisoner remanded. This was a *habeas corpus* at common law. Will not the principles of this case apply to the several branches of our legislatures and supreme courts, Federal and State? A different principle seems to be adopted in New York as to the Court of Chancery. A. 6, s. 3, 4.

This was a *habeas corpus* to the commanding officer of a man of war to bring up the bodies of two persons, *ad testificandum*, two common sailors on board, but not as prisoners: held 1. The writ was void and might be disobeyed, because not signed by a judge: 2. Because no affidavit—these two men had been served with *subpoenas* and were willing to attend: 3. They never can be brought up as prisoners against their consent. The general principles of this case extend to many cases in our practice.

So the court will not grant a *habeas corpus* where there appears to be any contrivance for a prisoner in execution.

So no writ of *habeas corpus* ought to issue to bring up a prisoner of war taken on board an enemy's privateer ship; nor to bring up a prisoner of war *ad testificandum*.

Nor for the master to bring up an apprentice above eighteen years old, who was impressed, but afterwards voluntarily entered in the sea service.

Nor a person committed by rule of court, if a supreme court. Such case is not within the *habeas corpus* act. Chief Justice of a different opinion. See Ch. 220, a. 6, s. 3, 4.

Nor for an *alien enemy*, prisoner of war, however ill used or deceived,—not entitled to any of the privileges of Englishmen. Refused to bring up a soldier in the United States' army.

§ 8. Cases in which *habeas corpus* is granted. See Apprentices, Guardians, &c. Parent and Child, Trespass, False Imprisonment, Synopsis, &c. sundry cases. Lies for one taken by an escape-warrant by one not an officer. *Rich v. Doughty*, 3 Salk. 149.

As to process of arrest and imprisonment, and bailing of offenders under Federal law. See Ch. 222, a. 13, s. 2, 3.

§ 9. One for a crime may be committed by one magistrate on affidavit made before another, as above. The Supreme Court of the United States may issue it *ad subjiciendum*.

Denied to an officer arrested on charges of misconduct, who made affidavit he had not been brought to trial according

Ch. 220.  
Art. 3.

3 Wils 188.  
—2 W. Bl.  
754, Crosby's case.—Many cases cited, 1 Mod. 144,—8 D. & E. 314.—Cro. Car. 148, 567, 579.

Cowp. 672, *Rex v. Roddam*.—Several forms &c. *Bohun*, 287, 295.

8 Barr. 1449, *The King v. Burbage*.  
2 Burr. 765, *Rex v. Schiever*.

Dougl. 419.—6 D. & E. 499, *Rex v. Reynolds*.  
1 Stra. 142, *Rex v. Leonard*.

2 W. Bl. 1324.  
—1 Salk. 354.  
—1 Johns. Cas. 136.

4 Cranch, 76, 135.

2 Maule & Sel. R. 428, *Blake's case*.

CH. 220. to the articles of war, as soon as a court martial could be conveniently assembled, reason for the delay being shewn.

Art. 3.

4 Dallas, 419,  
417.—2 Stra.  
989.

Proceedings on *habeas corpus*; see False Imprisonment, Ch. 172 &c. It is a general rule on *habeas corpus* for the court to inquire only if there be sufficient probable cause for the commitment. The court will not, therefore, on this writ determine the right of guardianship, or any other right not involved in the inquiry, if sufficient probable cause of commitment.

2 W. Bl. 806,  
807, Mashe's  
case.—Salk.  
348, 361.—  
Carrh. 168.

The court will not receive the return of a writ of *habeas corpus* till the return day. Prisoner discharged, because the conclusion of the commitment was, *till delivered by due course of law*, which ought to be only when committed for an offence indictable, not when committed in pursuance of a special authority to which the conclusion must conform as in this case, as to smuggling &c., that is, till he give a satisfactory account of himself.

1 W. Bl. 410,  
413, The  
King v. Dela-  
val & al.;  
many cases  
cited.—1  
Stra. 444.—1  
Salk. 360.—  
1 Ld. Raym.  
386.

When a court delivers on *habeas corpus* protection to the party discharged, *redeundo* is of course: 2. Whenever the court changes the custody of a person, it is done in court: 3. A return by complying with may be well enough without any return *in scriptis*: 4. The only order the court will make is one to prevent illegal restraint: 5. The *habeas corpus* must not be directed to the sheriff or gaoler in the *disjunctive*, and if so directed it must be quashed.

2 W. Bl. 1204,  
Warman's  
case.—5 D. &  
E. 89, 92,  
Rex v. Win-  
ton; several  
cases cited.

The return to a *habeas corpus* must answer to the taking as well as to the detaining; both must be accounted for by him who undertakes to imprison a subject or citizen. And it is a bad return to say, "I had not at the time of receiving this writ, nor have I since had the body of A. B. detained in my custody, so that I could not have her &c." Attachment against him who made the return; and held, an attachment may be granted for making an insufficient return to the first writ of *habeas corpus*, without issuing an *alias* and a *pluries*. The usual return is, "that the party has not the person in his possession, custody, or power." Same, General Lewis' case, 10 Johns. R. 228.

Stacy jun's  
case.

1 East, 306,  
317, The  
King v. Sud-  
dis.

But it is a good return to state, that the deft. is in custody under a sentence of a court of competent jurisdiction to inquire of the offence, and to pass such a sentence, without stating the particular circumstances to warrant such a sentence. See 8 Johns. R. 328, 341; 6 Johns. R. 337; 4 Johns. R. 317; 5 Johns. R. 282.

Cases of *habeas corpus* at common law. See Stra. 194; Sayer, 44; 1 Ld. Raym. 99, 545; Salk. 348; Cro. Car. 567, 579; Cro. Car. 168.

The great case of Yates in New York, Ch. 220, s. 6, s. 3,

4, in which it was decided that one committed by the chancellor for mal-practice and contempt of court, might be discharged on *habeas corpus* by a judge of the Supreme Court &c. See Yates' case. Is regulated in Kentucky by statute of Dec. 19, 1796, which directs the mode of suing out and proceeding in writs of *habeas corpus*;—may be signed and issued by a justice of the District Court of Court of Quarter Sessions; but is not allowable in cases of treason, nor after conviction, nor on execution.

CH. 220.  
Art. 4.

ART. 4. *Contempts.*

Process of contempt is one branch of summary proceedings, not however like most summary proceedings introduced in modern times; for this process of contempt is very ancient, perhaps coeval with courts of law. Much has already been said as to the principles of law in the cases of contempts, Ch. 193, a. 22, a. 25, and especially art. 28; where the inquiry principally was, what is a contempt of court &c., and matters taking place on the civil side of the court, and before the attachment of contempt issues, but after issued, the proceedings are on the criminal side, and the State or United States become a party. Therefore, as above stated, all proceedings in cases of contempt of court are in the end criminal, and an interesting part of criminal law. Process of contempt to be considered here is to bring in the party and to proceed with him. The process of all summary convictions "is extremely speedy," though the courts of common law check them "by making it necessary to summon the party accused before he be condemned; this is now held to be an indispensable requisite, though the justices long struggled this point," forgetting Seneca's rule of natural reason, "*qui statuit aliquid parte inaudita altera, æquum licet statuerit, haud æquus fuit*;" a rule, says Blackstone, to which all municipal laws that are founded on the principles of justice have strictly conformed; the Roman law requiring a citation at least; and our common law never suffering any fact (either civil or criminal) to be tried, till it has previously compelled an appearance of the party concerned. The principle holds in process or proceedings of contempt. What are acts of contempt, see Ch. 193, a. 28. When the contempt is committed the process against the offender is immediate, and is "an inseparable attendant on every superior tribunal; and accordingly we find it actually exercised as far back as the annals of our law extend." If the contempt be committed in the face of the court the offender may be instantly apprehended and imprisoned at the discretion of the judges, without any further proof or examination." But this must be done by some warrant, mittimus, or act of record, and this or a copy ought to be given to the offi-

Forms, 10  
Went. 266,  
300.

3 D. & E.  
183.—2 East,  
182.—7 D. &  
E. 430, 523.  
5 John. R.  
225.

4 Bl. Com.  
279, 280.—  
Salk. 181.—  
2 Ld. Raym.  
1405.

4 Bl. Com.  
283.

CH. 220.

Art. 5.

not committing the offender, and for this officer's security and justification in case he be sued or questioned for false imprisonment. See *Anderson v. Dunn*, 6 Wheat. 204 to 235. Anderson brought trespass against Dunn, serjeant at arms of the House of Representatives in Congress, for committing Anderson on the speaker's warrant for his contempt to the House. Deft. justified specially under the warrant. Judgment for him. But as to contempts committed at a distance from the court, and not within its view, the offender cannot be arrested or brought, or punished without process and evidence by affidavits of others, or confession &c. The foundation of this process is usually the affidavits of persons in whose presence the contempt is committed. Whenever these affidavits are deemed by the court sufficient, the usual practice is to make a rule on the accused to shew cause why an attachment of contempt should not issue against him, or in very flagrant instances of contempt the attachment issues in the first instance. And so the attachment goes, if the accused do not on the rule served on him, shew sufficient cause to prevent its issuing. The rule is made absolute, and on this process the accused is arrested and brought in, and then he stands committed, or puts in bail, in order on oath to answer such interrogations as shall be put to him for the better information of the court as to the circumstances of the contempt; and if the accused refuse to answer interrogatories or answer them evasively, he is guilty of a repeated contempt, to be punished at the discretion of the court.

Kentucky, a juror guilty of contempt to the court may be fined \$8; failing to appear, not exceeding £10; same, a witness £3; Toulmin's K. Laws, 201, 220, 339.— See 1 Hawk. 88, 89.

ART. 5. *English cases of contempt and process &c.*

Salk. 176,  
Toler's case.

§ 1. A, an infant, sued a writ, and D was admitted his *prochein amy* after the writ was sued out and before it was returned. The under-sheriff delivered it back to the infant plt. and some of his other relations at their request, and this matter was answered when the sheriff was called on to return the writ; and held, the conduct of the officer was a contempt, for the court held, the writ was subject only to the direction of the guardian, and so is the writ, though an infant may be nonsuited. The under-sheriff, said the court, has delivered the writ without authority, and this is a contempt. He was fined and committed by the usual process of contempt. It is a contempt not properly to execute punishment.

2 Burr. 792.

Salk. 260.

§ 2. The plt. in ejectment to recover the land, or in an action to recover the *mesne* profits, is a nominal person, and it is a contempt in him to release either action, and for this contempt he is committed.

Salk. 278,  
Rex v. Preston.

§ 3. Lord Preston was committed by the Court of Sessions for refusing to be sworn to give evidence to the grand jury on an indictment of treason. And on *habeas corpus* brought

by him, held a great contempt, for which he might well be fined and committed till he paid his fine. A sheriff is not liable to process of contempt for not executing process, not coming to his personal knowledge, nor left at his office, but delivered to a deputy. 1 Johns. Cases, 137.

Cn. 220.  
Art. 5.

Held in this case, if a stranger by contrivance defeat a rule of court, and the part of the benefit of the award, it is a contempt to the court, and process of contempt may go against him.

Salk. 696,  
Butler's case.

§ 4. A copy of a bill of Middlesex was served on the deft. attending the sittings. On motion against the attorney for a contempt, it was said to be right, because it was not an arrest which restrained him of his liberty. But the court said, the privilege was designed to prevent any interruption of the business of the court &c., and so equally a contempt for which he might be committed.

2 Stra. 1094,  
Cole v. Hawkins.

§ 5. But it is no contempt for which the court will commit the party, to challenge a special jury, on account of the sheriff's interest.

2 Stra. 1000.

§ 6. Generally, if there be faults both sides, and the officer behaved badly executing the process, as well as those who resist him, the court will not grant this extraordinary process of contempt.

Loft, 35,  
Gregory v. Onslow.

§ 7. This process, an attachment, had issued against the deft. for disobeying an award, and filing a bill in chancery against the arbitrators, and he had been examined upon interrogatories. Motion for the master's report on the last day of the term, without previous leave of the court; on affidavit the deft. had made the proceedings on this very attachment the subject of a supplementary bill, and had moved for an injunction. Objection, that this motion was irregular; but *per curiam*, in a case so extraordinary as this, the contempt being every day increasing, the court will dispense with their rule. But being objected the deft. was not personally served with notice of this motion, but only that it was put under his chamber-door, the court, for that reason only, refused the motion. See sundry attachments for contempts. 2 Com. D. Chan. D. 3, &c.

1 W. Bl. 1317,  
Rex v. Wheeler.  
A judge may *ore tenus* order one to be committed for a contempt in court, Holt on Libels, 160.

§ 8. The court declared a declaration in ejectment was so far a process of the court, that they would punish by process of contempt, contemptuous words uttered on the delivery of it, as a contempt of the court.

Stra. 567,  
Rex v. Unitt.

§ 9. The court ordered this process, an attachment of contempt *nisi*, against the town-clerk of Guilford, and a deft. convicted on the game act, for granting and suing out a replevin of goods distrained for the penalty. But the rule was discharged, because it was only a contempt to the inferior juris-

Stra. 567,  
Rex v. Burchett.



**CH. 220.** diction of the justices, in which case B. R. never interposes.  
**Art. 6.** When the jury returned their verdict, not guilty, there was a

6 D. & E.  
 531, Rex v.  
 Stone.  
 2 Dougl. 516,  
 Rex v.  
 Vaughan.

shout in the hall, and one Thompson, jumping up in the middle of the court, waving his hat and hallooing, was fined £20, and taken into custody by this process of contempt.

§ 10. Rule for an attachment in the B. R. against the deft. for acting as an attorney of this court after having been struck off the roll, and cause shewn. Held, if he positively answers and denies the charge, this court refuses the attachment, without entering into the credit of the parties or the probability.

**ART. 6.** *American cases of process of contempt.*

9 Johns. R.  
 160.

§ 1. *The evidence.* Proceedings against a sheriff for not returning a writ are entitled in the original case, including the rule for the attachment, until the writ of attachment. The proceedings after the attachment is granted are in the name of the people.

2 Johns. R.  
 290, The  
 People v.  
 Few & al.

*Disrespect to the court disavowed.* This was a motion for this process of contempt, an attachment. The court refused to make a rule absolute, because the party shewing cause disavowed on oath any intentional disrespect or contempt of the court, and declaring the resolutions complained of were passed at a public meeting for an election of governor, and intended only to enforce it.

2 Johns. Cas.  
 294, Butter-  
 worth v.  
 Stagg.

§ 2. A brought an action in the name of B, without his consent or privity. Held, it was a contempt of court, and when the nominal plt. was nonsuited, process of attachment was granted against A for the costs.

4 Johns. R.  
 317, 376,  
 Yates' case,  
 decided,  
 three judges  
 against two.  
 Many cases  
 cited. But 6  
 Johns R.  
 337 to 523,  
 a different  
 decision on  
 all the points  
 in the Court  
 of Errors, as  
 below.

§ 3. So in this case held a contempt to use another's name &c. As where a master in chancery filed a bill to which he signed the name of a solicitor of the court without his privity, and in his name prosecuted the suit, contrary to the statute concerning solicitors &c., and in wilful violation of his duty as master, and in contempt of the authority of the court, as was alleged; for this the chancellor committed the master to gaol for this mal-practice, stated in the order of commitment and contempt, there to remain until the further order of the court. Held, this was a legal and valid commitment for a contempt, even if the master might have been indicted for an offence against the said statute. Held, also, this court has no power to discharge a person committed by the Court of Chancery for a contempt, but it will presume its proceedings were on good grounds. [Action against the chancellor. 5 Johns. R. 282, 299.]

6 Johns. R.  
 337, 523,  
 Yates v. The  
 People, in the  
 172.—But 9  
 Johns. 395.—Holt on Libels, 143, Mr. Keteltas was committed for a contempt by the House

§ 4. But it was in this case held, that courts of justice cannot commit for contempts, for an indefinite time, or until the Court for the Correction of Errors. Furlong v. Bray, 2 Saund. 182.—1 Mod. 9  
 Johns. 395.—Holt on Libels, 143, Mr. Keteltas was committed for a contempt by the House of Assembly in N. York; and Geo. Clarke's case.

CH. 220.  
Art. 6.

further order of the court, this was, in substance, a reversal of the decision, above, in this same case. Also held, in this case, that a party out of court cannot, without a writ or warrant, be committed by an order of court for a contempt: also 3. That one who has been committed, and then set at large, cannot be again committed by an order grounded on, and reciting, the original writ of attachment; though committed by the chancellor and discharged, on *habeas corpus*, by a judge of the Supreme Court, in vacation: 4. That the original commitment by the chancellor, for said mal-practice and contempt, was illegal and void, being for an offence against the statute, of which the Court of Chancery had no jurisdiction, that court having no criminal jurisdiction; and the offence being indictable, and the offender not being punishable twice, was the reasoning, once for contempt, and once by indictment, as the offence was one entire offence, a master in chancery practising in the name of a solicitor, without his consent: 5. That the court of chancery cannot commit for a contempt on the affidavit of witnesses only, without first putting the party to answer to interrogatories, wherein he has the benefit of his own answers on oath: 6. That a judge of the Supreme Court, in vacation, has the same power by the statute to hear and decide on *habeas corpus*, which the court itself possesses at common law, except in cases of treason and felony: 7. That if a judge, in vacation discharges a prisoner brought before him on *habeas corpus*, such discharge being within his jurisdiction, whether erroneous or not, is final, and the party cannot be again imprisoned for the same cause, unless by order of the court in which he is recognised to appear, or other court having jurisdiction of the cause: 8. That a person committed regularly, and set at large, cannot be recommitted by an order grounded upon and reciting the original writ or attachment: 9. Where a court of chancery commit, a judge in vacation, or the Supreme Court in term time, may discharge the prisoner, on *habeas corpus*; and it seems if committed for a contempt only: 10. A writ of error lies to the Court for the Correction of Errors on a judgment of the Supreme Court, on a *habeas corpus* returned, awarding the prisoner to be recommitted: 11. That a prisoner may be discharged on *habeas corpus*, though the conviction or judgment on which committed, remains in full force. It will be observed that on most of these important questions the court was divided, sixteen against twelve; in the minority were the chancellor and three of the judges, and two of the judges in the majority; the most important question was, if an award on *habeas corpus*, that the prisoner be recommitted &c., was such a judgment as was the subject of a writ of error. See

Bushell's  
case.

CH. 220. Error, Ch. 137. Many of these matters were decided differently, 9 Johns. R. 395, 442, *Yates v. Lansing*, jun.

Art. 6.

1 Dall. 319.

§ 5. It is a contempt to endeavour to prejudice the public mind in writings as to a cause depending in court, for which the court may issue the process of contempt. But if the offender be present, on a rule to shew cause why an attachment should not issue against him for a contempt, the court will not make the rule absolute, but give judgment directly for the offence.

Mass. Col. law, A. D. 1641.

§ 6. By this law, passed as early as 1641, by the legislature of the Colony of Massachusetts Bay, any contempt of court was punishable by fine, imprisonment, disfranchisement, or banishment. This banishment was a severe and very unusual punishment for offences of this kind.

An act in Ken. of Dec. 19, 1793, limits the fine & time of imprisonment for contempt, except found by jury.

1 Caines' R. 518.

2 Caines' R. 97, *The People v. Judges of, &c.*; & 334, *The People v. Vanwyck*.

§ 7. The French Penal Code, art. 222 to 233, has minutely reduced the French laws on this subject to writing; and embraced all insults and violence committed against the depositaries of the public force and authority. This portion of the French Code may well be followed.

§ 8. Denying any disrespectful intent is only an excuse, but no justification, if the words be contemptuous in the court's opinion.

§ 9. Judges of an inferior court refused to sign a bill of exception, and a *mandamus* issued, ordering them to do it; an affidavit for an attachment against them therefor, must state the persons are those who should have signed it; and cause may be shewn against a rule for an attachment by affidavit, and the party need not appear personally. 1 Johns. R. 63, 64.

3 Johns. R. 138, *Jackson v. Virgil*.

§ 10. If a party disobey a judge's order, he is not in contempt unless the original order is shown him; when the copy is served; nor for non-payment of costs, unless shown the power to receive them by him who serves the said bill.

9 Johns. R. 395, 441, *Yates v. Lansing*.

§ 11. *Powers of the court of chancery as to contempts.* A master in chancery was committed by order of the court of chancery; which order stated, that A. B., while master, filed a bill, and thereto subscribed C. D.'s name, one of the solicitors of the court, without his knowledge, (contrary to the statute &c. only surplusage,) in wilful violation of his duty as master, and in contempt of the court, and the said A. B. was ordered to be committed to gaol, until the further order of the court. Held, legal: 2. That a judge of the Supreme Court could not, on *habeas corpus*, discharge A. B.: 3. The Court of Chancery may, in its discretion, commit for contempt on the affidavit of witnesses only, without putting the party to answer on interrogatories: 4. Such commitment may be for an indefinite time, or till further order of the court: 5. Nor has a judge

of the Supreme Court power, in vacation, on *habeas corpus*, in such case to discharge : 6. And if improperly discharged Chancery may recommit him : 7. Nor can the Supreme Court discharge in such case. It is a contempt to challenge a member of a legislature, or to offer to bribe him. Cases in Congress and in New York ; Holt on Libels, 143, 145.

CH. 220.  
Art. 7.

ART. 7. *Process of outlawry.*

§ 1. After an indictment, information, or inquisition is found or taken against an offender, and he cannot be found to be brought in to answer the charge against him, the next step is this process of outlawry against him. This subject of outlawry has been touched upon in considering civil actions, where by it there is a forfeiture of property, and by it, in certain cases, an inability is created to sue or prosecute civil actions, both of which naturally come under consideration in treating of civil actions. See Ch. 3 ; Ch. 69 ; Ch. 123 ; Ch. 136 ; Ch. 176 ; and the principles of it, Synopsis, Ch. 193. It remains here to consider our process of outlawry. This process of outlawry is not found in the United States laws, and if practised at all by the courts of the United States, it must be in virtue of some State laws ; nor was there any process of outlawry at common law ; nor have we adopted the English laws on this subject, any further than they serve to explain some expressions in our own laws on this subject. Nothing of outlawry appears in the Colony or Province laws of Massachusetts. But the first we find of this process in our statutes is a clause in our treason act of 1777.

English form of the exigent, 10 Wentw. 270. —Forms in outlawry referred to, Index, 86, 87 —Proclamation, form, Bohun, 337, &c.—Mass. Act, 1777, s. 7.—Maine Act, ch. 60.

§ 2. The 7th section of this act provides, that any person indicted for any treason, or misprision of treason, may be outlawed, and thereby attainted of, or for, any of said offences of treason, or misprision of treason ; and that all process of outlawry, hereafter to be made or had within this State, against any offenders in treason, or misprision of treason, being resiant, or inhabitant, out of the limits of this State, at the time of the outlawry pronounced against them, shall be as good and effectual in law, to all intent and purposes, as if any such offenders had been resident and dwelling within the State at the time of such process awarded and outlawry pronounced.

§ 3. Section 8 enacts, that if the party outlawed shall, in a year after the outlawry pronounced, or judgment given on such outlawry, yield himself to the Chief Justice of the State, and after to traverse the indictment, he shall be received to to the said traverse, and found not guilty, shall be discharged of the said outlawry, and of all penalties and forfeitures by reason of the same ; and on this trial he has the full benefit of this act.

Section 9 provides, that every person convicted of any

CH. 220. manner of treasons by process of outlawry, shall forfeit to the  
*Art. 7.* State all goods and chattels he is possessed of at the time of  
 such conviction, and all real estate owned by him at the time  
 of the treason committed, or any time after. Upon this act  
 it ought to be observed that it does not point out any form or  
 manner of outlawing a person; but it barely enacts, that any  
 person indicted of treason &c., may be outlawed, and there-  
 by attainted of treason or misprision of treason; nor was there,  
 at the time this treason act was passed, (A. D. 1777,) any  
 statute in Massachusetts as to outlawry: Hence it follows our  
 legislators understood the outlawry must be according to the  
 English law, and it could not be otherwise. It is evident this  
 act, in this respect, was intended principally against the then  
 conspirators and absentees, whose cases have been considered  
 in former chapters. But it was soon understood to be tedi-  
 ous and troublesome to go through all the forms of outlawry,  
 according to the English laws. If outlawry could be by the  
 English law, see below.

Mass. Act,  
 Oct. 2, 1792.  
 —Maine Act,  
 ch. 69.

Therefore sometime before the close of the revolutionary  
 war, this act was passed by our legislature, "directing and  
 regulating the process of outlawry." This act was framed on  
 the principles of the British process of outlawry, (but not in  
 the forms of it,) and suited to our situation; and the situation  
 of each of the thirteen Colonies, or States, being the same in  
 this respect, it is conceived that the principles of this act of  
 outlawry, applied in substance to each, hence cited at some  
 length. Sect. 1 enacts, that when any person "shall stand  
 charged of any criminal offence, before the Supreme Judicial  
 Court of this government, by the indictment or presentment  
 of a grand jury," whether found in it, or removed into it, "by  
 appeal, or writ of *certiorari*, shall abscond to avoid answering  
 or abiding and performing the judgment that may be given  
 thereon," before or after indicted, "a writ shall issue to the  
 sheriff of the county where such offender was an inhabitant  
 or resident, at the time of finding the same bill, directing him  
 to make known to such offender that unless he shall appear on  
 the first day of the next sitting of the said Supreme Judicial  
 Court, and there traverse the same charge, and abide the  
 judgment that shall be given thereon, or appear and give such  
 security therefor, by way of recognisance, as the said court  
 shall order, such person will then and there be declared an  
 outlaw, and be subject to all the penalties and disabilities in  
 this act, declared to be incident to a person under the sen-  
 tence of outlawry; and the mode of executing the said writ  
 of *scire facias*, shall be by leaving an authenticated copy  
 thereof, certified by the sheriff, at the offender's dwelling-house,  
 or last place of abode, sixty days, at the least, before the  
 same process shall be returnable, and shall cause an abstract

CH. 220.

Art. 7.

or notification of the subject matter in the same writ mentioned, sixty days before the return day at least, to be printed in one of the most public weekly newspapers, and to be continued five several weeks inclusive, and shall cause him to be publicly called, in every court of General Sessions of the peace in his county, that shall be holden while the same process shall be in his custody; which writ of *scire facias* being served and returned in manner aforesaid, and filed in court, shall be entered on the docket, and the party against whom the same issued, after having been publicly called in the said Supreme Judicial Court, to appear and answer the charge alleged against him, as aforesaid, if he shall not appear upon such notice and proclamation, his default shall be recorded, and such offender by the same court be declared an outlaw, without any other act or ceremony, any former law, usage, or custom, to the contrary notwithstanding." By a proviso, at the end of this first section, the court may suspend judgment of outlawry a certain time, on bail given for the offender's answering and abiding the judgment. Thus one indicted for any criminal offence may be outlawed by the Supreme Judicial Court, and by no other court.

§ 4. Section 2; this section declares what shall be evidence of an offender's absconding after having appeared and pleaded to the indictment, and who shall depart without the leave of the court.

§ 5. Section 3 respects evidence of absconding while the indictment is pending in the Sessions.

§ 6. Section 4 respects a *capias* in a county in which the Supreme Judicial Court sits but once a year.

§ 7. Effect of outlawry, by section 5, is disability to maintain, in his own right, any action, and "under such other disabilities and disqualifications in civil society, as a person convicted and sentenced for the offence charged in the bill upon which he may be outlawed;" and if a greater forfeiture do not accrue to the State "upon conviction and judgment on such bill of indictment, shall forfeit the issues and profits of all his real estate, during the life of the outlaw," in case the judgment of outlawry so long remain in force, and is further liable to be arrested on a *capias utlagatum*, and sentenced in the manner as if he was convicted by a jury of the charge alleged in the bill.

§ 8. Section 7 makes the outlaw's real estate liable to respond judgment for fine and costs, from the time the *scire facias utlagatum* issues; and lands of all those recognising to the State made liable from the date of the recognisance.

§ 9. Sect. 8 provides, "that every offender that may be outlawed upon his appearing in open court and confessing the

CH. 220.  
Art. 8.



charge, and receiving sentence thereon, or appearing and traversing the charge, shall be acquitted by a jury, or on demurrer, or any other plea, the same shall be adjudged insufficient in law to compel the person accused to answer thereunto, or to support a judgment thereon; in every such case, the proceeding shall be construed to operate as a full and effectual reversal of the judgment of outlawry, as though a formal reversal had been given upon a writ of error, expressly brought for that purpose, provided the appearance upon which such acquittal shall be given, shall be voluntary, and without compulsion, and within one year and a day after judgment of outlawry shall be pronounced, and the costs accruing on the process of outlawry shall be first satisfied and paid."

Mass. Act,  
Feb. 16,  
1786.

§ 10. By the 15th section of this act, as to taxes, it is enacted, "that any constable or collector of any town, district, plantation, parish, or precinct, shall abscond or secrete himself for the space of one month, having assessments in his hands unsettled, the selectmen or assessors of such town, district, plantation, parish, and precinct, are hereby empowered to charge such constable therewith, by declaration filed in the Supreme Judicial Court, and thereupon to proceed to judgment of *outlawry* against such constable or collector;" and the town &c. may choose another.

Comments.

ART. 8. *General principles.* This process of outlawry has ever been somewhat vague and uncertain in Massachusetts, if not in all the English Colonies, now United States.

3 Bl. Com.  
284.

§ 1. Nothing is recollected to shew it was practised in the times of the Colonies; and it is difficult to see how it could be, where there was no Colony statute to aid this process. As observed above, it existed not at common law, and "till some time after the conquest, no man could be outlawed, but for felony." But as early as Bracton's time, "process of outlawry was ordained to be in all actions of trespass *vi et armis*." Since, it has been by many statutes extended to many cases of actions, sued by *original*, but not in those sued by *bill*, a distinction never of much importance in New England, if in the other Colonies. The English process of outlawry has ever been in a form and manner not well to be pursued here; for instance, if in England the party sued or accused, could not be found, then after the proper returns thereof by the proper officer, the *exigi facias* has issued to the sheriff, commanding him to cause this party to "be required from county court to county court, until according to the law and custom of England he be outlawed, if he doth not appear; and if he doth appear, then to take him, and cause him to be safely kept" &c. On this *exigi facias*, the sheriff required him at five successive county courts in his county,

3 Bl. Com.  
Appendix,  
16, 18.

CH. 220.

Art. 8.

held monthly, and accordingly returned his *primo exactus*, at such a court so holden, his *secundo exactus* at &c., his *tertio exactus* at &c., and so his *quarto and quinto exactus* at such a court &c., and that he did not appear; then issued the writ of proclamation, reciting the former writs issued, and that he did not appear &c., and then commanding the sheriff by virtue of 31 of Eliz. to cause this party to be proclaimed on three several days, according to that act, one at the door of the church &c.; to this he returned, he at his county court, held &c. caused to be proclaimed the first time; and at the Quarter Sessions of the peace, held &c., he caused to be proclaimed the second time, and at the most usual door of the church of B—, on —, immediately after divine service, one month at the least before the said party was required the fifth time, he caused to be proclaimed the third time, to surrender himself &c.; then issued the *capias utlagatum*, to take this party, as one actually outlawed, in such a suit &c., and him safely keep &c.; on this *capias* the sheriff made return according to the fact. This process of outlawry in England, has ever depended on many statutes relating to civil and criminal proceedings, extending this process first to felony, and then to most trespasses and civil actions, and regulating this process as to forms and manner, and having particular reference to the state of the courts and officers in England. It is doubtful if the English Colonies, now United States, adopted these statutes. In Carolina, where so many English statutes were adopted, as appears Ch. 196, it does not appear that these statutes as to outlawries, were adopted, in any considerable degree, if at all. But even if they were adopted in any English Colony, it seems they could not be executed, because in the Colony there were generally no courts at which they could be executed, according to the intentions of them; the monthly county courts, for instance, in England, were the courts principally in which this process of outlawry was executed, and being held monthly, the whole process on the *exigi facias*, was executed in five months. But there never were any such courts in many of the Colonies; and it can hardly be presumed our courts of law would undertake to execute this process, which put a man "out of the protection of the law," so that he was rendered by it "incapable to bring any action for the redress of injuries," and by it forfeited his goods and chattels to the king, in courts in America, so very differently constituted, without any statute authority given by the Colony legislature. On the whole, I should readily infer this process of outlawry did not lie in any English Colony, in which there was no Colony statute whatever to regulate it. But yet we have seen there was in 1777,



CH. 220. no such statute in Massachusetts, yet our legislature, in  
 Art. 8. passing then the treason act, directed the offender be outlawed,  
 which certainly supposed *prima facie*, there was then existing  
 a process of outlawry in the State of Massachusetts. The  
 Colony legislatures had no inducements to favour outlawries  
 on English principles; because on them the goods and chattels  
 of the party outlawed were forfeited to the king. And it is  
 believed that there never were any such forfeitures in America  
 by implication; that no man in the English Colonies in  
 America, ever forfeited *all his goods and chattels* for any  
 misconduct, without some express statute, English or American,  
 passed for the purpose. The English statutes above  
 named or referred to, as to outlawries and forfeitures thereon,  
 when enacted, were never made to extend to the Colonies,  
 and were never here in force, unless adopted here silently, in  
 practice by our courts of law, of which there is no evidence  
 found, and, as already observed, there was no inducement to  
 adopt them. And it may be added, there never has been, in  
 general, any occasion here for outlawries in civil actions, be-  
 cause in our practice judgments have always been allowed on  
 defaults, and on which judgments all the property of the deft.  
 and usually his body, has been liable to be seized and dis-  
 posed of in execution, to satisfy all debts and demands against  
 him. So that whether defts. in civil actions, duly served,  
 have appeared or not, the plts. on their executions, have had  
 every advantage. Therefore in 1782, when our legislature  
 passed the above act, to regulate the process of outlawry, it  
 was confined to criminal cases, and not extended to civil  
 suits;—also confined it to criminal cases pending in the  
 Supreme Judicial Court alone, another reason for supposing  
 the broad English process of outlawry, had never been adopted  
 here, for if it had been this very limitation had been a very  
 great change in the law on this subject; a change too great  
 to be made at once without any notice being taken of it. It  
 has been thought by some, that our legislature did not intro-  
 duce this clause into our treason act of 1777, because it was  
 thought the process of outlawry was then in force, but be-  
 cause it was then expected an act would soon or immediately  
 be passed, such as was passed in 1782, to regulate this pro-  
 cess. If so, there is no difficulty in reconciling the laws on  
 this subject. And they have stood thus before the American  
 revolution. There were no material reasons existing for estab-  
 lishing the process of outlawry in Massachusetts, or in the  
 English or British Colonies generally; none in civil actions  
 of any material importance, and none very material in criminal  
 cases, as crimes were never numerous here, and as punishments  
 here have been principally inflicted on the persons of offend-

ers, and in no very great degree by forfeitures of their estates in *toto*, real, personal, or both. And as to criminal cases, the outlawry of the accused in England, has ever been a part of the proceedings against him on the indictment &c., and these proceedings have been materially governed by English statutes in criminal cases, by which statutes our proceedings, trials, and punishments, in cases of crimes, have been in no considerable degree governed at any time, but almost altogether by our own statutes,—except in cases of treason and misprision of treason. As to these, this act provided, that every person indicted for them should be tried according to the 7th W. III. “entitled an act for regulating trials in cases of treason and misprision of treason,” and also the accused to be entitled to the benefits of that act. The provisions of this act were well calculated to guard the rights of the subject accused. It certainly is very questionable if the provincial act of 1696, had any reference to outlawries. It directed the trial to be according to the 7th W. III. but makes no mention of outlawries in any case, and if it had mentioned them generally, how could the process of outlawry, in any case, have been carried through our courts, so very different from the English courts, and on English statutes, without the aid and direction of any statutes of our own. By what authority could our Superior Court, for instance, for the execution of the *exigi facias*, have substituted any court of ours, without any statute to the purpose, to the English county courts held monthly?

CH. 220.  
Art. 9.

Mass. Act,  
1696.

On the whole, it seems that no process of outlawry was provided in Massachusetts till 1782. And the only process we have ever had, is that which was established by that act.

ART. 9. *The principles of the act of 1782 noticed.*

§ 1. This act is confined to criminal cases : 2. To those only pending in the Supreme Judicial Court : 3. To those only by indictment or presentment of a grand jury : 4. To those cases only in which the accused absconds, to avoid answering or abiding the judgment on the indictment : 5. After certain proceedings had, pointed out in the act, he is actually an outlaw, and subject to the disabilities of one outlawed : these are, 6. Inability to maintain any action in his own right : 7. Such other disqualifications and disabilities, and forfeitures, as the law annexes to the crime charged in the indictment ; and if this annex no greater forfeiture to the crime charged, then he forfeits, on being outlawed, the issues and profits of his real estate for his life, if the outlawry continue so long not reversed : 8. When outlawed, he is liable to be taken on a *capias utlagatum*, and sentenced as if convicted : 9. But the outlawed may by appearance &c. avoid the effects of the outlawry : 10. This act, 1782, is merely affirmative,

CH. 220. repeals no law, and has in it no expressions to exclude other  
 Art. 10. law, and therefore if the English statutes and practice were in  
 force here on this subject before the passing of this act, they  
 are so yet.

§ 2. But though it is conceived we had legally no process of outlawry before this act was passed, and hence it was found necessary in 1782 to enact this; yet in the construction of this act, and in practice upon it, many very useful decisions will be found in the English books; because here, as in England, an outlawry is very penal, and therefore the process here, as there, is to be strictly executed; and any defect there that will make this process of outlawry void or reversible, will make it so here; for instance, if the outlaw be not correctly and truly named and described in it. So the outlaw's disabilities to sue &c. must be construed here on the same principles as there, and so his forfeitures. Hence some English decisions on this subject deserve attention, because they directly contain principles applicable to American cases of outlawries, some few of which have existed, and more may exist.

ART. 10. *English decisions.*

Co. L. 128.

§ 1. Every where outlawry is a punishment for refusing to be amenable to the law of the land. It is a high offence then to refuse, for which the outlaw justly forfeits property and privileges, and it is said, anciently "any one might as lawfully kill a person outlawed, as he might a wolf, or other noxious animal." But since the time of Ed. III. one outlawed has been liable to be put to death but by the sheriff, having lawful authority for that purpose.

2 Hale's P.  
C. 202, 203.  
5 Co. 91.

§ 2. The sheriff may break open the house of one outlawed, to take him, after notice;—so the house of another. And so may the constable or any person in pursuit of one outlawed or indicted for felony.

§ 3. As the punishment of outlawry is severe, no one can be outlawed without due notice, and evident contempt to the court. And in giving this notice, the accused is to be accurately named and described; and if not, the outlawry is reversible.

2 Hale's P.  
C. 207, 208.  
—Dyer, 239.  
—2 Rol. 803.  
—Co. L. 122.  
—Cro J. 368,  
Middleton's  
case.—Cro.  
Car. 58,  
Smith v.  
Ashe & ux.

§ 4. Outlawry can be only in a criminal case, on indictment in one court only, of one capable of a crime and absconded. What is a criminal case must be decided, as in former chapters, by English and our law and decisions. As to what is an indictment or the proper court, no question can arise. As to capacity, an infant above fourteen years of age may be outlawed, but not under that age. But his outlawry is not void, being matter of record, but is voidable only by writ of error. In the English practice, a woman is said to be *waived*,

and not *outlawed*, for special reasons ; but this distinction does not exist in our law, for our statute declares that any person standing charged &c. may be outlawed ; and a *feme covert* may be outlawed with or without her husband, especially for treason or felony. Hutt. 86 ; Siderfin, 20, 21 ; 4 Ed. III. 34 ; 14 Ed. III. 1 ; 18 Ed. IV. 4 ; 11 Hen. IV. 71.

CH. 220.  
Art. 10.

§ 5. *Outlawries of several.* If several are charged as principal felons in the indictment they may be outlawed together ; but where principal and accessory are indicted together, the principal must first be outlawed, and be thereby attaint, equal to conviction, then an *exigi facias* may go against the accessory, and if he appears on the *capias*, he is bailable till the process be ended as to the principal. And this is a common law principle, further settled by Westm. 1. So if A and B be indicted as principals in felony, and C as accessory to both, the exigent against C shall stay till A and B be attainted by outlawry or plea ; for it is said, if one be acquitted, the accessory is discharged, as he is indicted as accessory to both, so not to be put to answer, till both be attaint, and when indicted as accessory to both, he must be proved so, though he might have been indicted as accessory to one, as the felonies are in law as several. But according to a later case, though indicted as accessory to both, yet if proved accessory to one, he may be convicted ; but *quare*, for a criminal case especially ought to be proved strictly as it is charged. In treason all are principals ;—hence process of outlawry may go against him who receives, at the same time, as against him who did the fact. Yet this receiver shall not be tried and convicted, till he who committed the fact is convicted.

2 Hale's P.  
C. 200.—2  
Ins. 183.—  
Staundf. P.  
C. 69, 70.—7  
Hen. IV. 36,  
40.

4 Co. 44.

9 Co. 119,  
Sanchar's  
case.—2  
Hawk. P. C.  
306.

1 Hale's P.  
C. 238.—2  
Hale's P. C.  
206, 206,  
399.

§ 6. *Disabilities and forfeitures how limited.* Judgment of outlawry being itself an attainder, and attended by several disabilities and forfeitures, it is necessary to see how the law is in these respects. In general our laws annex to each crime certain disabilities and forfeitures specified in the act that declares the crime ; these are not varied in cases of outlawry, for that being an attainder of the crime, these parts of the assigned punishment follow. But the outlaw is also punished as guilty of a new offence, in refusing to be amenable to justice, and his outlawry and its effects are his further punishment for this new offence. These effects are here to be attended to. And though an outlawry be an attainder, and equal to a conviction or sentence by verdict or confession, yet it does not subject the party to any severer punishment than the crime does for which the outlawry is pronounced. Hence, if a clergiable crime, he has his clergy, as if convicted by verdict or confession. And according to this case, an outlawry for a misdemeanor, “ does not enure as a conviction of the

2 Haw. P. C.  
446, 447.—  
2 Stra. 824.  
—10 Mod.  
188, 358,  
409.—Stra.  
530.

2 Hale's P.  
C. 350.

2 Salk. 404

Ch. 220. offence, as it does in cases of treason and felony, but as a  
 Art. 10. conviction for the contempt, in not answering; which contempt  
 is punished" in England by forfeiture of his goods and chattels, but here of the issues and profits of his real estate, as above. And Fleta 42, *Quamvis quis pro contumacia et fuga uilagetur, non propter hoc convincitur est de facto principati.*

Sect. 8, net  
 1782.—Co.  
 Lit. 31.


§ 7. As the outlaw forfeits the issues and profits to the State, it has the pernancy of them, but no longer than he has an estate, and ends with his death always, or the outlawry reversed, or the party's appearing, taking his trial and acquittal by verdict, or on plea or demurrer; the outlawry ceases to have effect as to forfeitures, costs being paid. There are further limitations; as if a wife be outlawed, and then her husband dies, she has her dower, as it was not forfeitable at the time of her outlawry. And whenever there are several interests in one piece of property, the king or state can never have more than the outlaw has. Hence if A lease land to B, at will, and B sows the land, and A, the lessor, is outlawed, the State &c. shall not have the corn, but only the rent for it;—can be entitled to no more than the lessor himself. But if tenant at will sow the land, and is afterwards outlawed, the corn is forfeited as a part of the issues and profits of it; because whatever the outlaw could claim and take as part of them, if not outlawed, he forfeits, by the outlawry, to the State. The right of forfeiture takes place at the time of the outlawry. The right thereby accrued then fixes in the party to whom forfeited; and cannot, on general principles of law, be varied by after events. Then, in every case, the inquiry comes to this point, what were the outlaw's rights or title to the issues and profits at the time of the outlawry? Were they then his? Was he then entitled to them? If he were so then he forfeited them, though not ripe to be taken, but become fit to be gathered afterwards, as in the case of the corn sown and growing when the outlawry was declared. But the issues of land have reference to the inquisition found, as *post*.

11 H. VI., 17.  
 —Cro. El.  
 576, 581.

So the forfeiture can be only of issues and profits the outlaw has in his own right; but if he has them in *auter droit* they are not forfeited; as if he has them as executor, administrator, or guardian, and is outlawed, he forfeits them not.

Cro. Jam.  
 612, 613, Rex  
 v. Exrs. of  
 Dacombe.

§ 8. So issues and profits held in trust for another are not forfeited by the outlawry of the trustee, but are by that of the *cestui que trust*. As where a lease was made to Dacombe and others for ten years, in trust for S, he was attainted of felony. Held, this trust for S was forfeited, and the executor of S was compelled, in equity, to assign accordingly. And a case was cited in which A took a bond in B's name, and A

was afterwards outlawed ; held, the king should have it. So **CH. 220.**  
 one Armstrong being lessee for years, assigned to A in trust **Art. 10.**  
 for himself, Armstrong, and being attainted of felony, held   
 this trust was forfeited to the king. So if trust be fraudulent ; **3 Bac. Abr.**  
 as where A granted the trust of a term for the use of him- **756.—3 Co.**  
 self, his wife, and children, &c. ; held, liable to be forfeited if **82.**  
 made fraudulently, with intent to avoid a subsequent forfeit-  
 ure ; but if fairly made, then forfeited so far only as reserved  
 for the benefit of A himself ; and if fairly made or not, must  
 be a question to be left to a jury on the whole circumstances  
 of the case ;—and shall never be presumed by the court to be  
 fraudulent, where fraud is not expressly found. And a term  
 limited to executors, and not vested in the testator, is not for-  
 feitable. See *issues of land* considered, Ch. 69, a. 3 ; and  
 in part in reference to this subject of outlawry. **Cro. Car. 546.**

The forfeiture of the issues and profits, at the time of the **Co. L. 13, 14.**  
 outlawry, does not affect the cases where the law otherwise **—Hal. P. C.**  
 provides, as in the case of our treason act of 1777, which **261, 262.—**  
 provides that the real estate of the traitor be forfeited from **2 Hal. P. C.**  
 the time of the treason committed ; and therefore if he alien **206, 207.**  
 his lands, after the treason committed, before conviction or  
 outlawry, they are forfeited ; but the lord's escheat in felony re-  
 lates only to the time of the outlawry pronounced, where no time  
 of the crime committed is alleged ; but to make any forfeiture at  
 all the whole process of outlawry must be returned, and be of  
 record ; for this title, by forfeiture, is a title of record, and  
 unless the record be complete, as the law requires there can  
 be no such title ; but the case is different where this record  
 was once complete, and since lost, for then on circumstances  
 a jury, on the general issue, may find a record, though not  
 shewn in evidence.

§ 9. Though the right to the issues and profits by forfeit- **Hard. 101,**  
 ure relates to the time of the outlawry, and the State may **176, case of**  
 then immediately have an inquisition ; yet if it delay the in- **Hammond.**  
 quisation sometime, and in the mean time the outlaw *bonâ* **—Raym. 17.**  
*fide* aliens or leases the land, the alienation or lease will be **—Lev. 38—**  
 good. So of a fine levied. *Windsor v. Seywell*. And on **Keb. 57, 74.**  
 considering many authorities, it is laid down, that the outlaw **—Selk. 296.**  
 “ does not forfeit the profits or his lands, nor chattels real, till **—3 Bac. Abr.**  
 inquisition taken.” Hence an alienation, “ after outlawry, and **759, 761.—**  
 before inquisition, is good to bar the king of the parcenary ; **Hard. 106,**  
 but if he makes a feoffment after inquisition, the feoffee has **191.**  
 the estate, and the king has the profits.” And this inquisition  
 ought to be certain as to the parcels, occupations, value, &c.  
 of the lands.

§ 10. *Bill of discovery*. Often in England a bill is exhib-  
 ited by the Attorney General against the person outlawed, to

CH. 220.

Art. 10.

discover his estate, and what secret and fraudulent gifts and conveyances he had made, as by the outlawry, then his goods and the profits of his lands are forfeited. In a case of this kind the deft. objected *quia nemo tenetur prodere seipsum*, and to discover his estate on a forfeiture; but the court held, he ought to answer the bill, because the king is entitled to his estate by the course of law, and the outlawry is in the nature of a gift to the king, or a judgment for him; and a common person may have a bill of discovery in a like case to enable him to take out execution. This seems to be a common principle, and applies wherever there is a chancery court to enforce it. 3 Bac. Abr. 761.

Hard. 22,  
Protector v.  
Ld. Lumly.

Lit. sect. 197.

—Co. L. 128.

—28 Ed. III.

92.—5 Co.

109.—7 Co.

29.—3 Bac.

Abr. 761.—

Jones, 239.—

Lutw. 1604.

§ 11. *Party's disability to sue how limited.* It is a general principle, that an outlaw is disabled to sue a civil action; for by his contumacy he is out of the public protection, and shall have no benefit from the law he has violated, and to which he refuses to be amenable; but he may be sued. And this disability may be taken advantage of, by pleading the same in bar or abatement; in abatement, in all cases; but not in bar, but where the cause of action is forfeited; nor can outlawry be pleaded in actions in which the damages are uncertain; and it is said, in some books, that outlawry can be pleaded in bar after it is pleaded in abatement, because the thing is forfeited, and the plt. has no right to recover. This may be doubted for two reasons: 1. It produces unnecessary delay in pleading: 2. What is matter in bar ought to be pleaded in bar, as every matter by all the rules of good pleading ought to be pleaded in the first instance according to the nature of it. But this disability cannot be taken advantage of till the outlawry is completed of record; as it is pleadable only as a bar of record. This disability is further limited; it is pleadable against the outlaw only when he sues in his own right, as above stated; for when in *auter droit*, those he represents have the privileges of the law. But the outlaw is disabled to sue *qui tam*, as he recovers a moiety to his own use; nor can he be a relator in an information to recover any benefit to his own use. But the party outlawed may bring error to reverse the outlawry in that suit, and no stranger's outlawry shall prevent him. And if pleadable as being in another court, it must be brought in immediately, or it is no bar; but otherwise when in the same court, for then the record is ready in court. As outlawry is a temporary disability to the plt., it does not abate the writ, but only disables the plt. to proceed, for on his getting a pardon, or reversal of the outlawry, he is restored to his law, and shall oblige the deft. to plead to the same writ. This means where the cause of action is not

Co. L. 128.—  
Dyer, 317,

2 Mod. 267.—

10 Mod. 186,

246, 379.—3

Bac. Abr. 762.

—Raym. 46.

—5 Co. 88.—

6 Co. 53.—8

Co. 142.—

Doct. Pl. 397.

lost, but restored to the outlaw, where there is this pardon or reversal.

Ch. 220.

Art. 12.

But outlawry is a bar to an *audita querela*, though only to get a discharge, and the C. J. said, it was all one to gain by a discharge, as by way of perquisition, and wherever the suit is *ad lucrandum*, there ought to be ability in the person.

Cro. J. 425,  
Griffith v.  
Middleton.

But where C brought error to reverse a judgment in ejectment, and the deft. in error pleaded outlawry in one of the plts.; on demurrer to this plea, it was held ill; as this was only a commission which went in discharge, and in which all the plts. in error were obliged to join. But if two plts. in debt be barred, and bring error, the outlawry against one is a good bar against the other, because they are to recover the debt.

Cro. Jam.  
616, Bythal  
v. Harris.

6 Co. 25, 26.

In pleading an outlawry the deft. must conclude his plea with a *prout patet per recordum*, and not *hoc paratus est verificare*. To plead more outlawries than one, is double. And outlawry may be pleaded to a bill in equity, except where the outlawry is part of the grievance the bill complains of, and it is *exceptio ejusdem rei cujus petitur dissolutio*.

3 Bac. Abr.  
764.—3 Lev.  
29.—Carth.  
8, 9.

#### ART. 11. *Other disabilities.*

One outlawed cannot be a juror, for he is not *liber et legalis homo*, as the law requires; nor can he execute an office in a corporation.

Carth. 199.

The Doctor in divinity thinks the outlaw does not, *in consequence*, forfeit goods &c., but where he has notice of the suit. The Student gives this answer: When one commits an offence he must expect he will be sued or prosecuted, and hence is bound to obtain knowledge of the action or prosecution against him, and ought to offer amends for his trespass; so his ignorance of the suit is his own fault. But this seems to be no answer where he is outlawed, and has committed no offence or trespass, and has no notice of the suit or prosecution against him. But it is added, one holds not his property by the law of *reason*, nor by the law of *God*, but by the law of *man*; and this "law may assign such conditions upon property as it listeth," not repugnant to the law of God, or law of reason, "and may lawfully take away that it giveth, and appoint how long the property shall continue." And one condition the law assigns is, forfeiture of goods &c. for outlawry had according to law. Where outlawry is as an attainder, see Ch. 221, a. 8.

Doct. & Stud.  
109, 110.

#### § ART. 12. *Process in Virginia in criminal cases.*

At a General Court &c. held, "where an indictment or presentment is found by a grand jury, against any person for a misdemeanor to which the law has affixed an infamous or corporal punishment, that the court, before whom such pre-

The Commonwealth v.  
Josiah  
M'Clenegan  
3 Hen & M.  
575.



CH. 221. sentiment or indictment is found, may, in its discretion, award  
 Art. 2. a *capias* in the first instance ; and that upon indictments and  
 presentments of an inferior nature, such court ought, after two  
*venire facias* have been returned not found, to award a *capias*." Hence ordered, that it be certified to the Morgantown D. Court that a *capias* be awarded, &c.

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## CHAPTER CCXXI.

### PLEADINGS IN CRIMINAL CASES.

#### ART. 1. *Pleas.*

§ 1. Having pursued pleadings &c. till the accused is brought into court or outlawed for not appearing, it is next to be considered what is to be done in regard to him when in court, in order for his pleas and trial. When thus in court he is arraigned or put to the bar to plead in the manner stated Ch. 193, a. 35. And if he challenges above the proper number of jurors, or stands mute, or confesses or approves, he is proceeded with as stated in that article, and art. 37. When the accused has got passed all these matters or steps in the cause, he comes to his pleas of various kinds, mentioned generally in the synopsis, Ch. 193, a. 36, in a concise manner to shew their several relations to and bearings upon each other ; some parts whereof need not be mentioned again, being there and in other places in this work sufficiently noticed already, as also, arraignment, standing mute, and confession, *certiorari*, *approvement*, pleas to the jurisdiction, and in abatement, *auterfoits acquit*, *auterfoits convict*, *auterfoits attain*. These do not need further attention.

But some other parts of pleas in criminal cases need further attention. As

#### ART. 2. *Demurrers.*

§ 1. Demurrers have been considered already in general principles ; and here they will be considered no further than they contain some matters peculiar to criminal cases. Demurrer to the indictment or information comes first into view. This is when the facts alleged therein are allowed to be true, but the deft. takes his legal exception thereto, and joins issue on some point of law to the indictment or information by

which he urges that the facts stated therein, though true, do not amount to treason, felony, or to the crime charged. As if the deft. be indicted for stealing things part of the freehold, he may demur, admit he took the things, but insist on it there is no felony in the case. So the deft. may demur to any defect in the indictment that makes it bad in law. An important question has been made by some, whether if the deft. demur to the indictment or information, and it is decided against him there must not be final judgment against him on the demurrer and execution, as if convicted by verdict, the facts being confessed by the demurrer, and the indictment &c. being adjudged good. But others hold otherwise, and say he is to be directed and received to plead the general issue, not guilty, after a demurrer decided against him. And they say also, this is reasonable, for if the deft. freely discover the fact in court, and refers a question of law to the court, and it decides it against him, the court will not record his confession thus made, but admit him afterwards to plead, not guilty. Thus demurring is a mistake in point of law, and in pleading, and though a man by mispleading may lose his property, but yet the law will not by such niceties, suffer him to lose his life. However, doubts still remain on this point, and therefore demurrers to indictments are not often used. And generally they are not advisable for other reasons, because the same advantages may usually be taken on the plea of not guilty, or afterwards in the arrest of judgment. And this indulgence is no greater than is often allowed in capital cases, to which perhaps it is confined, for it is usual in them if the prisoner pleads guilty, or confesses the charge for the court to advise him to put himself upon trial, and not to record his confession.

CH. 221.  
Art. 3.

2 Hale's P. C.  
226, 257.—  
4 Bl. Com.  
327.—  
Staundf. P.  
C. 142.

§ 2. But it is clear if the prisoner pleads in bar, and concludes to the felony, or pleads a pardon when he concludes not to the felony, and the attorney general demurs and the deft. joins in demurrer, and it is adjudged against him, yet he shall be put to answer to the felony, for his joining in demurrer is no confession of the indictment.

2 Hale's P. C.  
257.

§ 3. If the jury cannot agree in their verdict and are discharged, this is no matter the prisoner can plead in his defence when again put on his trial.

2 Day's Cas.  
504, The  
State v.  
Woodruff.

#### ART. 3. General issue.

§ 1. Some special pleas, as *autrefois acquit*, *convict*, and *attaint*, having been sufficiently noticed in former chapters, we come now to the general issue in all criminal cases, which is, not guilty. Usually in civil actions the party is tied down to one plea, and if he have his election of several and makes his choice of one of them, he must abide by that one, and

4 Bl. Com.  
331, 332.—  
2 Hale's P. C.  
239.—22 Ed.  
IV. 39.

CH. 221. having lost on that, is not allowed to resort to another plea.  
 Art. 3. But this is not always the case in criminal causes, such strict-



ness is not used in cases in which life is concerned ; but in such cases, often at least, when a prisoner's plea in bar is found against him upon issue tried by a jury, or adjudged against him on demurrer and point of law by the court, still he shall not be concluded or convicted thereon, but shall have judgment of *respondeas ouster*, and may plead over to the felony, not guilty. "For the law allows many pleas by which the prisoner may escape death ; but only one plea in consequence whereof it can be inflicted, viz. one, the general issue, after an impartial examination and decision of the facts by the unanimous verdict of a jury."

2 Hale's P. C.  
 256, 256.—  
 22 Ed. IV. 39.

§ 2. And regularly where a man pleads any plea to an indictment which does not confess the felony, he shall plead over to it in *favorem vite*, and that pleading over is neither a waiving of his special plea, nor makes his plea insufficient or double. Hence, if he pleads any matter of fact to the indictment or pleads *auterfoits convict*, or *auterfoits acquit*, he shall plead over to the felony, and though he do not prevail upon his plea, but it is tried and found against him, yet he may plead over to the felony and have a trial if guilty of it or not.

2 Hale's P. C.  
 256,—22 Ed.  
 IV. 22,  
 Wheeler's  
 case.

§ 3. But if the deft. plead to the jurisdiction of the court, as if an indictment of rape be found before the sheriff in his turn and delivered to the justice, because he has no jurisdiction to take such indictment, the prisoner may plead to it without answering to the felony ; so if the justices of the peace should arraign one for treason ; for the indictment being void there can be no valid trial on it, then it is enough to state in a plea the matter that shews it void. And see the preceding article, also pardon, below.

4 Bl. Com.  
 332, 333.

§ 4. *Not guilty* is alone the plea on which the prisoner can receive his final judgment of death. In case of an indictment of felony or treason, there can be no special justification put in by way of plea. As in case of murder one cannot plead it was in his own defence against a robber on the highway, or a burglar, but he must plead the general issue, not guilty, and give this special matter in evidence ; for these pleas in effect amount to the general issue, since if true the prisoner is clearly not guilty, as the facts in treason are alleged to be done *proditorie*, and against his allegiance ; and in felony, that the killing was done feloniously. Now these charges of a felonious or traitorous intent are the points and very gist of the indictment, and if not proved, and they never can be if the fact be done in self-defence, &c. there is no proof of treason or felony, and of course the deft. is not guilty of the treason or felony laid in the indictment. Also, this intent being of

2 Hale's P. C.  
 256

the essence of the charge in it, there ought to be an answer directly by the general negative, not guilty; and the jury upon the evidence will take notice of any defensive matter and give their verdict accordingly. Hence, not guilty, is on all accounts the prisoner's best plea, to which the proper reply on the part of the clerk who reads the indictment is, *culpabilis*, or is guilty. And when the clerk asks the prisoner how he will be tried, his proper answer is, by the country, for we have no other mode of trial. And as to the more ancient answer, "by God and the country," it now has no meaning, though it once had, when it meant the prisoner would be tried by God, that is, by *ordeal*, and (or) by the country, that is, by a jury.

CH. 221.  
Art. 4.

§ 5. And on the plea of not guilty, the prisoner "shall have the advantage of all such defences as he can make to acquit himself of the felony or treason, and may give all his special defence in evidence." And "if duress or compulsion from others will excuse him, or his own necessary defence in safeguard of his life, or any other matter, the jury upon the general issue ought to take notice of it."

2 Hale's P. C.  
258.

ART. 4. *Challenge and trial.*

§ 1. Issue being joined and fixed for trial, we next attend to the jury which is to try this issue, and to the trial. We have already seen how our jury is situated and brought into court, and how trials are had generally, Ch. 182, under the head of trials. The principles of challenges, Ch. 193, a. 37, and the principles of trials, Ch. 193, a. 38, have also been considered. It remains here only to collect in detail a few cases and matters relating to challenges and trials by juries.

§ 2. *Challenges.* These are on different grounds in different States, as jurors are selected or drawn, and as juries are formed on different State statutes and laws; there is, however, a considerable uniformity in New England. When the trial of the prisoner comes on, the jurors are to be called and sworn to the number of twelve, unless challenged by him when called and before sworn. Peremptory challenges, or those without shewing cause, allowed in capital cases, are permitted on two grounds: 1. Every man is apt to conceive sudden and unaccountable prejudices at the bare looks and gestures of another. This is often the prisoner's case in regard to jurors, yet he can assign no reasons sufficient to exclude them. It is highly important when a man is put upon trial for his life he should have a good opinion of those who try him, and in whose hands his life is; to be obliged in such case to be tried by men against whom he has conceived a dislike, would probably wholly disconcert him. And the law in its compassion for his situation and tenderness towards him, does not will that he be tried by any one against whom he

4 Bl. Com.  
346, 347.—  
2 Hal. P. C.  
267, 276.

CH. 221. has conceived a prejudice, without being able to give a reason for it. 2. "Because upon challenging for cause shewn, if the reasons assigned prove not sufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment; to prevent all ill consequences from which the prisoner is still at liberty, if he pleases, peremptorily to set him aside. Usually, therefore, it must be advisable for the prisoner to challenge for cause first, so that if he fail to set several aside for cause alleged, he may afterwards challenge them peremptorily if he sees fit. This peremptory challenge is not allowed to the government, nor to the prisoner after the juror is sworn.

Mass. Treason Act of 1777.—Act of Congress, April 30, 1790, sect. 30.—Ch. 193, a. 35.

§ 3. By this act a prisoner pleading to an indictment for treason, or misprision of treason, and who "shall have put himself upon God and the country for trial, shall be admitted peremptorily to challenge twenty of the jury and no more," (35 at common law); and by said act of Congress, thirty-five in treason, and twenty in other capital cases.

§ 4. Our peremptory challenge of twenty of the jury in cases of capital felonies is by the common law generally, and in favour of life. By our law if the party challenges more than the legal number in treason or capital felonies, his challenge is disallowed by the court, for all challenged beyond that number. But by the ancient law thus to challenge beyond the legal number and persisting in such challenge were viewed as standing mute and refusing trial, and subjected the prisoner to the *peine forte et dure* in felony, and to attainder in treason. But the better opinion is, that when 22 H. VIII. c. 14, limited the challenge in felony to twenty, and the prisoner challenges above that number, he is not so subjected, but as in our practice his said challenge of more than twenty is disallowed as to all over that number.

2 Hale's P. C. 267.

§ 5. But this peremptory challenge does not exist where the prisoner pleads any foreign plea in bar or abatement, which goes not to the trial of the felony, but of some collateral matter only. But if he pleads such matter in felony or treason, and also pleads over, not guilty, he has his challenge peremptorily, as his life is at stake, and those challenged within the legal number are withdrawn out of the pannel. And if twenty men be indicted for the same offence, though by one indictment, yet every prisoner has his peremptory challenge of twenty—but then tried separately.

2 Hale's P. C. 270.—36 H. VI. 26.—14 H. VII. 19.—2 R. III. 13.

§ 6. If the prisoner challenge a number of the jury for causes, say six, and the causes are found insufficient, and they are sworn, yet the prisoner may challenge them peremptorily in favour of life, for possibly a new cause of challenge may intervene after the swearing; but if the prisoner challenge a

juror for cause, he must shew a cause happened after the former swearing.

CH. 221.  
Art. 6.

ART. 5. § 1. *Challenges for cause are:* 1. *To the array:* 2. *To the poll.* The challenge to the array is at once to the whole pannel for some cause that makes the whole illegal. This cause may be some fault or partiality in the officer who selects and forms the jury. As where a sheriff interested, or a deputy sheriff not authorised causes the jurors to be drawn and impannelled in a flowing cause, or for any other cause that makes the whole jury illegal or not, according to law. And the government may challenge for cause as well as the prisoner.

3 Bac. Abr.  
251.—2  
Hale's P. C.  
270.

§ 2. In England and in several of our States, if an alien be indicted of felony, though the indictment is to be found by a grand jury of natives; yet the alien indicted of felony may in season claim his jury *per medietatem linguæ*: viz. half to be aliens, (but not in treason.) Therefore, if an alien be indicted of felony and pleads not guilty, and a common jury is returned, he may surmise he is an alien, (but must do it before any of the jurors are sworn) and then he may challenge the array for this cause, and thereon a jury, half aliens, is convened, if he seasonably prays it. But there is now no such jury in Massachusetts or in many of our States.

2 Hale's P. C.  
271.

§ 3. This law allowed the plt. or deft., or delinquent "to be judged by a jury, to challenge any of the jurors; and if the challenge be found just and reasonable by the bench or the rest of the jury, as the challenger shall choose, it shall be allowed, and *tales de circumstantibus* impannelled in their room." And by another ancient law, after plea to the indictment the offender was "allowed his reasonable challenges." It is conceived, that any cause which renders the whole pannel illegal and not according to law, is a cause of challenge to the array; for no man is bound to be tried by a jury which is not according to law, either as to its formation or the qualifications of its members; but as to the qualifications of the individual jurors, they usually must be individual exceptions, and so to the poll.

Mass. Colony  
law 1641,  
pp. 109, 214.

§ 4. If the array be challenged it lies in the discretion of the court how it shall be tried, by what officers or persons.

It is a challenge to the array if the same objection lies against the officer, which is a cause of challenge to juror. So if the party name to the officer a juror;—so if the officer be liable to the distress of either party, or have part of the land depending on the same title, or either party has an action against him.

3 Bac. Abr.  
252.—Co. L.  
156.

ART. 6. *Challenges to the poll.*

§ 1. The rule is, a juror must be challenged when he is called and before he is sworn. Challenges to the poll are

Hob. 235.—  
3 Bac. Abr.  
266.

CH. 221. very numerous, because they may be to each individual juror, and for numerous causes as to each and every one of the jury.

Art. 6.

3 Bl. Com.  
361.

3 Bac. Abr.  
253, 254, &c.

3 Bac. 252.—  
Co. L. 156.—  
Dyer, 319.—  
3 Bac. Abr.  
253, 254, 255,  
258.—7 Co.  
18.—Co. L.  
155, 158.—  
Cro. Car.  
134.—2 Lev.  
263.—Raym.  
380.—Hale's  
P. C. 303.—2  
Hawk. P. C.  
417, 418.—  
Co. L. 157,  
158.—3 Bac.  
Abr. 259.—2  
Hawk. P. C.  
418.

3 Bac. Abr.  
259, 260.—  
3 Bl. Com.  
363.—3 Salk.  
81, 82.

Co. L. 158.—  
3 Bac. 266.

§ 2. By the Roman law a judge might be challenged on suspicion of partiality; but by the English law in the time of Bracton and Fleta, for good cause; but now the law is not so, and a judge cannot be challenged in England or America.

§ 3. Challenges to the polls in Massachusetts are of three kinds: 1. For defect, as an alien, and once a slave;—not having the estate required by law, as a rent of \$10 a year, or some estate of \$200 value;—not being of the proper age, as under twenty-one or over seventy years of age;—not having resided the legal time in the town.

§ 4. 2d. For bias or partiality, “as if the jury be akin to either party within the ninth degree,—hath been arbitrator on either side,—hath an interest however small in the cause,—an action depending between him and the party,—he has taken money for his verdict; has formerly been a juror in the same cause,—is the party's master, servant, steward, attorney, counsellor, or of the same society with him. All these are principal causes of challenge, and if true, cannot be overruled.” After a challenge to the array there may be one to the poll; but not *e converso*, that is, neither party shall take a challenge to the polls which might have been taken to the array. So if a juror eat or drink at the expense of either party it is cause of challenge. So if he has formerly given a verdict in the cause, whether between the same parties or others. So if the juror has a claim to any part of the forfeiture to be caused by the conviction. So if he has declared an opinion beforehand. But it is said, this is no cause of challenge where it appears to proceed not from any ill will, but a knowledge of the cause, but it is an objection within our statute, for in such case the juror has formed an opinion. But it is no good cause of challenge that the juror has found others guilty on the same indictment; for the indictment in judgment of law is several against each deft., and each one must be convicted by particular evidence against himself. *Acquaintance &c.* is a challenge to the favour, and must be left to the triers sworn, “well and truly to try whether A (the juror) stands indifferent between the parties to this issue.” Either party labouring a juror to appear, is no cause of challenge at all, but a lawful act. And if a juror be cousin to him in reversion it is cause of challenge, but only to the favour; but is a principal challenge if the reversioner be made a party by voucher &c.

If a juror be challenged by one party and found indifferent, he may be challenged by the other party; and he who has several causes of challenge against a juror, must take them all at once

§ 5. 3d. *Challenges to the poll for crimes and misdemeanors.* One may be challenged because an outlaw, or convicted of some infamous crime, as treason, felony, perjury, conspiracy, or if he has received the judgment of the pillory, or has been branded, whipt, or stigmatised, or attainted of false verdict or forgery. Challenges for crimes are only to the favour, unless the record of conviction is produced; nor are such exceptions done away by a pardon. CH. 221.  
Art. 6.  
3 Bac. 263,  
&c.—3 Bl.  
Com. 364.—3  
Bac. Abr. 364.

4th. *Several points.* A juror cannot be examined to any matter criminal or infamous in order to challenge. Cook, indicted for treason, offered to ask the jurors, in order to challenge them, if they had not said he would be hanged. *Per curiam*, this is good cause of challenge, but this must be proved by witnesses. 1 Salk. 163.

§ 6. If a juryman has previously given his opinion that one party was wrong, and the other right, or any way given his opinion on the question in controversy, this is good cause of challenge, and not waived by going to trial. 1 Johns R.  
316, Blake v.  
Millspaugh.

7. The deft., when arraigned, suggested he was an alien, and claimed to have a jury *de medietate lingua*. Held, the court of *oyer and terminer*, in New York, might order such a jury to be summoned, *instantier*. Is formed as if no statute existed &c. 2 Johns R.  
381, The People v. M'Lean.

§ 8. The court held, it is too late to object to the alienage of a juryman after verdict. *Hollingsworth v. Duane*. 4 Dall. 353.

§ 9. The right to challenge thirty-five jurors peremptorily, at common law, in a capital case, remains in all cases not specified in the act of Congress of April 30, 1790. This act, sect. 30, extends generally to capital cases, mentioned in this act, for the punishment of certain crimes against the United States. If therefore capital cases exist not named in or punished by this act, they may yet be at common law. The deft. was indicted on the act of Congress of March 26, 1804, as to destroying ships. 4 Dall. 413,  
U. States v.  
Johns.

§ 10. In this case a challenge of a juror was retracted; and he was sworn, on a trial for treason. *United States v. Porter*. 2 Dall. 346.

§ 11. Held, three defts. may join, or sever, in the challenge, in an indictment for high treason; they may challenge jointly, then all can challenge but thirty-five jurors and are tried together; but if they challenge separately, as they may also then each may challenge thirty-five, and they must be tried separately. 8 Salk. 80,  
Charnock's  
case.

A juror on the principal pannel was challenged, and afterwards sworn on the tales by a wrong name, and the court granted a new trial, though no fault was found with the verdict. Stra. 640,  
Parker v.  
Thornton.



CH. 221.

Art. 7.

Co. L. 155,  
157.—3 Bac.  
Abr. 266.

§ 12. There is a material difference between a principal cause of challenge, and a challenge to the favour; the first is grounded on a manifest presumption of partiality, which if found true very clearly sets the array or juror aside, without any other trial than its being made manifest to the court before which the pannel is returned; but a challenge to the favour, where the partiality is not apparent, must be left to the discretion of the triers; where the challenge is to the array the court, as above observed, directs the inquiry; if to the polls, and a juror is challenged, before any juror is sworn, the court will appoint two triers, and if by them he be found indifferent, and is sworn, he and the two triers shall try the next challenge, and if the next juror be found indifferent then the two triers will be discharged, and the two jurors tried and found indifferent will try the rest. Challenges are often tried in this way in most of the States south of New England. And where six jurors are sworn, and the rest challenged, the court may appoint any two of the six sworn, to try the challenges. The triers cannot exceed two but by consent.

2 Hal. P. C.  
276.

Co. L. 198.

Co. L. 158.—  
Trials Per  
Pais, 158.—3  
Bac. Abr. 267.

§ 13. The truth of the matter alleged as the cause of challenge, must be made out by witnesses to the satisfaction of the triers. Also the juror challenged may, on a *voir dire*, be asked such questions as do not tend to infamy and disgrace; such as, whether he has a freehold, or hath an interest in the cause; and in a civil, but not in a criminal, cause, if he has given an opinion beforehand on the right, which he might have done as arbitrator. And one witness, to prove the challenge, is sufficient. But in no case can a juror be asked if he has been whipped for larceny, or convicted of felony, or ever was committed to Bridewell for a pilferer, or to Newgate for clipping or coining, or if a villain, or outlaw, for these kind of questions tend to make a man discover that of himself which tends to shame, infamy, and disgrace. Challenge may be demurred to. The law holds no man to give answers that may disclose his own infamy, degradation, or disgrace.

Show. 173.

3 Bac. Abr.  
267.

#### ART. 7. *Trials in criminal causes.*

Ch. 182.

§ 1. Trials, generally, have been already considered; and it will be here necessary only to notice a few matters peculiar to trials in cases of crimes. When the pleadings are settled the challenges are over, and a full jury sworn and charged, then commences the trial, usually upon the general issue. The courts in which criminals are tried have been already considered, and their respective jurisdictions as to crimes and other matters. One very important question in this respect does not seem to be fully settled, that is, whether the Federal courts have jurisdiction in cases of indictments for crimes and offences at common law. But it seems to be settled, that

2 Dall. 384,  
396.—4 Dall.  
426, & ap-  
pendix, 16.

when the mortal blow is given at sea, and the death happens on shore in a foreign country, it is not murder these courts can take cognizance of under the act of Congress.

CH. 221.  
Art. 7.

§ 2. One very material matter attending the trial in criminal as well as civil cases is the evidence. This also has been considered at large, already under the head of Evidence, Ch. 80 to 100.

§ 3. Hence nothing in regard to trial and evidence will be collected in this article, but some few matters peculiar to criminal cases and trials by jury, almost the only manner of trial we have in such cases. The value and excellency of this is fully declared in all our constitutions, and repeatedly in our laws. In virtue of it no man can be called to answer for a capital or infamous crime, (except in the army or navy,) unless previously indicted by twelve or more of his fellow citizens; and the truth of every accusation must be established by the unanimous verdict of twelve more of them indifferently chosen; and all must be *liberi et legales homines de vicineto*. And every trial, in a capital case, must be before a full court, that is, judges competent to decide all questions of law arising in the course of the trial. And in every criminal case, it is a maxim, that no person be twice tried for the same offence; that no one be compelled to be a witness against himself; that every one have a speedy and public trial, be seasonably informed of the nature and cause of the accusation; to be confronted with the witnesses against him; and especially to have compulsory process for obtaining witnesses in his favour, to testify on oath, and to have assistance of counsel for his defence; and these pledges of a fair, and public trial, are his "in all criminal prosecutions;"—benefits but little enjoyed in other countries, many of them not even in England, in the main land of liberty; for there, to this day, the accused may be prosecuted by information in many cases of infamous crimes and punishments; and though to convict him the law has made provision for every exertion to be made for the crown, yet the accused is, in some respects, left without proper defence; "by a settled rule of the common law," no counsel can be allowed him, upon his trial, on the general issue, in any capital crime, unless some point of law shall arise proper to be debated; and if, in modern practice, counsel is allowed, it is not of right, but at the will and pleasure of the judge; and if, by some modern English statutes, there is some departure from this severity, or rather cruelty, of the English law, this is but very partial. (7 W. III. c. 3; 2 Geo. II. c. 30.) So it was a rule of the English law not to suffer the prisoner to exculpate himself by the testimony of any witnesses; and if the courts, ashamed of the practice, examined

Amendments  
Con. U. S.—  
And act of  
Con. April  
30, 1790.

4 Bl. Com.  
349, 350.

4 Bl. Com.  
352, 354.

CH. 221. witnesses for him, still they were not on oath; "the consequence of which was, that the jury gave less credit to the prisoner's evidence than to that produced by the crown;" and this tyranny (as Sir Edward Coke called it,) continued, even in all cases of treason, till 7 W. III. c. 3; and till 1 Anne st. 2. c. 9, in cases of felony. As to two witnesses in treason and perjury, see those heads, also Evidence.

Art. 7.

§ 4. After the evidence and arguments are closed in criminal cases, and the jury is charged by the court in the course of the trial, the jury, retires to think of, and to form their verdict, which may be general, guilty or not guilty, or special, but cannot be a privy verdict. Their special verdict states all the material facts and circumstances of the case, when they doubt the matter of law, and pray the judgment of the court; for instance, if murder, manslaughter, or no crime at all. They may always find a general verdict if they see fit, if, says Blackstone, "they think proper so to hazard a breach of their oaths." But as the law and fact is submitted to them, being involved in the general issue, how if they decide conscientiously, do they hazard a breach of their oaths, any more than a judge does, who, acting according to the best of his judgment, mistakes the law? And the same author says, "if their verdict be notoriously wrong they may be punished." On what principle punished, if they decide according to the best of their knowledge, and *bonâ fide*? No doubt they may be punished if they act *corruptly*, but our author makes not this distinction; and if he means they may be punished for an honest misunderstanding of the law, his theory has not been supported by practice even in England, for a long time, and never, at any time, in Federal America; for it is conceived there never was a jury here, punished for an *honest* verdict, though the law be misunderstood, especially when not enjoined by the court to find specially. But in such cases, the only remedy is to set the verdict aside, when that can be done. But this has never been done for centuries, when the prisoner has been acquitted; and when so, we have no appeal of felony as there is in England, whereby he may be further prosecuted.

§ 5. As to the place for trying crimes, piracy, see Ch. 210. a. 8; trial in treason, Ch. 193, a. 35; Ch. 200, a. 6, serving foreign states &c.

§ 6. By this act, one indicted of treason is entitled to a copy of the indictment, and a list of the jury and witnesses, three days before the trial; and in other capital cases at least two days before the trial, is entitled to such copy and a list of the jury. And every one so indicted for any capital offence, is admitted to make his defence by counsel, and on his

request the court must assign counsel, not exceeding two, as the prisoner desires, to whom they are to have free access at all seasonable hours. Also is entitled to the other constitutional privileges above stated, as contained in the said amendments of the constitution of the United States. CH. 221.  
Art. 7.

§ 7. Jurisdiction of courts as to trials in sundry cases, see Courts &c., Ch. 137.

In this act, sect. 29, it is provided, that in all cases punishable with death, the trial shall be had in the county where the offence was committed, or where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence. Act of Congress, Sept. 24, 1789.

§ 8. The attorney general, by entering a *nolle prosequi*, may prevent the trial of an indictment; and the court will put off a trial thereon for the absence of a material witness to be called by the deft. 5 Bac. Abr. 234.

§ 9. As to new trials, see New Trials, Ch. 193, a. 5, s. 11; and art. 7, Criminal Cases; Evidence, Verdict, Clergy, see those heads.

§ 10. *Putting off trials in criminal cases.* Trial on collateral issues, though in capital cases, not put off unless the deft. makes oath of the truth of the plea, as that he is not the person, or that he did not print and publish the libel &c. 1 W. Bl. 512, Rex v. Radcliffe.

§ 11. An information was filed against the deft.; and held, the trial shall not be put off on affidavit of the absence of a material witness, when the case is suspicious, and the witnesses are foreigners, not likely to return to the country where the trial is to be. 1 W. Bl. 516, 517, Rex v. D'Eon.—3 Burr. 1513.

§ 12. But in this case a trial was put off till a commission could go to examine a material witness who was out of the country, and who refused to attend the trial. 1 W. Bl. 512, Rex v. Williams.

§ 13. It must appear on the record, the trial was had by twelve jurors, or otherwise it is error, and the judgment shall be reversed. 2 W. Bl. 718, Rex v. Inhabitants of St. Michael.

§ 14. Withdrawing a juror after plea, jury sworn, and evidence offered, is not allowable, without the prisoner's consent, merely because the prosecutor is not prepared with his evidence; and when so done, the prisoner cannot afterwards be tried on the same indictment. If tried, the judgment may be arrested. But see art. 8, s. 2. 2 Caine's Ca. 304, The People v. Barrett.

§ 15. His confessions, in order to be an approver, how evidence or not. Not admissible when made to the State's attorney, and he cannot be admitted to disclose them; but are admissible when made by the prisoner to his own counsel, for the law protects such disclosures only when made to the examining magistrate or to the State's attorney, under such Kirby, 282, 345.

CH. 221. circumstances, that the prisoner viewed himself as a witness.  
 Art. 8.

3 Day's Ca.  
 283, United  
 States v.  
 Porter.—1  
 Phil. Evid.  
 16.

3 Day's Ca.  
 108.

§ 16. *Matter to be proved that needed not to be alleged.* As where there is an allegation in an indictment, that is not impertinent or foreign to the cause, it must be proved, though a prosecution for the same offence might be supported without such allegation: 2. The court is more strict in requiring proof of the matters alleged in criminal, than in civil cases.

§ 17. And if an offence punishable at common law, is averred in an information to be *contra formam statuti*, such averment is but *surplusage*, and does not vitiate.

§ 18. *Convicts in state prisons &c.* There are many long statutes on this subject. Massachusetts act of June 18, 1799, authorises the sessions to dispose of them in service for the payment of costs. June 4, 1802, an additional act was passed. May be placed in the houses of correction, by act of June 23, 1802. May be conditionally pardoned, by act of March 6, 1804. When sentenced to hard labour for stealing &c. how to indemnify the owners of the goods stolen, act of March 16, 1805. Sessions may liberate them from county gaols on certain terms, by act of March 7, 1806.

Afterwards many acts were passed in Massachusetts for establishing and regulating her State prison, and convicts therein; the substance of the provisions in which, may be seen in the acts of Maine of 1821, ch. 30, 31, & 32.

#### ART. 8. *Attainder and conviction.*

§ 1. Having considered Challenges, Trials, and New Trials, Evidence and Verdict, and Clergy, in their proper places; and having, Ch. 193, a. 36, touched upon Conviction and Attainder, it may here be proper to consider them more in detail.

§ 2. *Conviction* is by verdict or in a summary way; conviction by verdict is material, as it respects a future prosecution, and has been mentioned, Ch. 193, under the description of *auterfois convict*. It is a general principle, that if A be indicted, and convicted of felony, but hath neither judgment of death, nor prayed his clergy, he may be again indicted for the same offence, if the first indictment were insufficient, and if sufficient, it seems it is no bar without judgment or clergy, or outlawry, which is attainder; and so clergy is in the place of a judgment. And *auterfois attain de mesme felonie*, though on an insufficient indictment, was good at common law, and so is to this day. Where one is attainted of felony by outlawry, and that is reversed, he may be put to answer to the same felony, and plead to the indictment, whereof he was outlawed; but if he reverse the outlawry, because *auterfois acquit* for the same felony, (a matter assignable for error,) he

2 Hale's P.  
 C. 261.—4  
 Co. 46,  
 Vaux's  
 case.—Ch.  
 212, a. 11,  
 s. 25.

*auterfois &c.*  
 bad.—2  
 Hale's P. C.  
 262, 263.

shall be discharged of the indictment, for it stands as well a plea to the indictment, as an error in the outlawry. And it is a general rule that attain of treason or felony by outlawry or judgment of death, is a good plea to another indictment, till the outlawry be reversed, because the party stands attainted, and he can only be so on another indictment, conviction, and judgment. But if one, at common law, be indicted of felony, convicted, and have judgment of death, yet he may be arraigned for treason committed before the felony, on account of the forfeiture. Attainder for the same felony remains a bar to another conviction, though there be a pardon of it. But if one commit several felonies, and is attainted and convicted of one, and is pardoned as to *that one*, and then is indicted for the *other* felonies, and plead his former attainder, it is a good replication to say he was pardoned after, for thereby he is a person restored so as to be able to answer for other offences. So if a person convicted and attainted, afterwards commits another felony, and is pardoned of the first attainder, he may be put to answer to, and be convicted &c. of the new felony; as the attainder and pardon bar only as to the first felony. So if one commit several felonies, and be convicted for one of them, but no judgment of death, nor clergy, or outlawry. he may be indicted for all those former felonies. But if he had been convicted for any one felony, and had his clergy, the substitute for attainder or judgment of death, he never can be arraigned and convicted for any of those former felonies. And is not the effect the same of our *commutation*, of the benefit of clergy, Ch. 193, a. 40. By this commutation he has judgment to be punished by the gallows &c., but not of death, so is not attainted; hence is of a capacity to be convicted of, and punished for another offence. As if one commit a felony after conviction and clergy allowed for a former felony, he may be arraigned and convicted of the after felony, for not having judgment of death, so not being attainted, he is of a capacity to be convicted of, and punished for another crime; but not when "he stands attainted and unpardoned;" as then his life is forfeited, and he is dead in law, and when he is adjudged to be put to death, and is to be brought to execution, any further conviction is useless. And after this judgment of death, the law "takes no farther care of him, than barely to see him executed." He is *attinctus*, or blackened, no longer of any credit; he cannot be a witness in any court; nor can he perform the functions of another man. But there is a great difference between a conviction and attainder, though often confounded. One only convicted is liable to none of these disabilities, but the law still supposes he may be innocent; judgment may be

CH. 221.  
Art. 8.

3 Hale's P.  
C. 263.

4 Bl. Com.  
374.

CH. 221. arrested &c. ; the indictment may be bad ; he may be pardoned, or have his clergy or commutation, and avoid an attainder. But he is deemed completely guilty when judgment is pronounced ; and it is only on judgment of death "the attainder of the criminal commences ;" or judgment of outlawry on a capital crime, equal to judgment of death. Hence on judgment of outlawry or of death for treason or felony, a man is, and first is, attainted. But the consequences of this judgment in our law, are generally different from those in England, as to forfeitures of property, as stated under the head of Forfeitures and Judgments.

Art. 9.

As to England, see 1 Cruise, 173.  
—3 Do. 378.  
—4 Do. 22.

13 Mass. 455,  
Commonwealth v. Goddard.

§ 3. Former conviction before a justice of the peace, pleaded to an indictment of assault and battery ; *oyer* of the record and demurrer to the plea in bar. Record shew he first ordered the deft. to recognize to appear at the Common Pleas, then revoked the order, and fined him ; plea held good. In pleading such a plea, it is not necessary to plead over to the indictment. It seems that the conviction by the justice was after an arrest on a warrant, trial, and hearing witnesses, and probably the complainant here differs from Low's case, in which a justice's conviction was no bar, because the offender only was before him.

#### ART. 9. Summary convictions.

1 Salk. 378.

2 Ld. Raym..  
1220, Regina  
v. Highmore.

1 Stra. 608,  
Rex v. Theed.  
—2 Ld.  
Raym. 1375.  
Must not appear to be wrong.

§ 1. These being a departure from the sound principles of the common law are not to be encouraged, but the law will hold a strict hand over them, and require them to be certain and strictly, according to law the party convicted must be duly notified and be present at the trial : 1. As to jurisdiction and certainty,—a summary conviction made by a magistrate &c. must always be so stated as to appear to be within his jurisdiction. As where a justice is authorised to convict of an offence committed within his jurisdiction, the conviction must specify the place where it was committed, and state that to be within such jurisdiction. But in this case the court held, a conviction shall be presumed to be right where the contrary does not appear. This was a conviction for obstructing an excise officer in coming to weigh candles ; and it was objected that by the statute (Anne) the officer has power to enter by day or by night ; and if by night, then in a constable's presence, and here not said whether by day or by night ; it might be by night without a constable, and then it was lawful for the deft. to obstruct. *Sed per curiam*, "that should have been shewn by the deft., and then he would not have been convicted. It is enough the conviction does not appear to be wrong,"—presumed the entry in the day.

1 Stra. 261,  
Rex v. John.  
402.

§ 2. Held in this case, appearance by the deft. cures defects in the summons which was to appear the same day.

The statute required the conviction to be by justices of the county where the offence was committed ; and objected this did not appear in the case. *Et per curiam*, "that must appear, or else they have no jurisdiction." Quashed—"their jurisdiction must appear otherwise than out of their own mouth." CR. 221. Art. 10.

§ 3. The court held in this case, that in a summary conviction it is sufficient to describe the offence in the words of the statute. 1 Ld. Raym. 583.

§ 4. Lord Mansfield said, in *Rex v. Baker*, "nothing wrong appeared upon the face of the conviction ; and therefore the court supposed and took it to have been rightly transacted." Stated, it was read to and fully understood by the deft. 2 Burr. 1165 ; cited from 2 Stra. 1240.

In this case the court held, it is sufficient the conviction states the witness was examined on oath, without stating the magistrate had authority to administer the oath. Held, also, if the convicting magistrate give a proper date to the time of the conviction on the face of it, and afterwards add an impossible date to the time when he sets his hand and seal to the conviction (being before the offence committed,) the latter may be rejected as surplusage. 2 East, 195, . *Rex v. Picton*.—Also, 4 D & E. 67 ; also 1 D. & E. 320, above, as to surplusage.

ART. 10. *Evidence in defts. presence.*

§ 1. It must always appear directly or by fair implication, the evidence was given or read in the deft's. presence.

§ 2. Conviction quashed : and held 1. The evidence must be set out that the court may judge of it : 2. It must be given in the deft's. presence that he may cross-examine, and so appear, and so bad, where stated, the witness came before the justices and deposed the defts. confessed to him they had agreed to raise their wages, whereupon they appearing before the two justices to answer the said charge, and having heard it, and in the presence of the witness being called on by the justices to shew cause why they should not be convicted &c., and having nothing to say thereupon, they are convicted for unlawfully entering into such combination, bad ; for though it might be inferred remotely the evidence was given in the deft's. presence, yet not stated to be so. 2 Burr. 1163, *Rex v. Verpont & al.*

2d. Bad, also, because there was no adjudication, only a mere conviction,—ought also to have adjudged the forfeiture, even if the penalty be certain, much more if at the discretion of the court to commit to the house of correction, or to the common gaol, and for any time not exceeding three months.

§ 3. So in this case a conviction was quashed, because the witness was not sworn and examined in the deft's. presence ; and also held, it is not enough to read over the deposition of the witness in the deft's. presence. It seems the witness tes- 1 D. & E. 125, *Rex v. Crowther*.



CH. 221.  
Art. 12.



1 D. & E.  
320, Rex v.  
Hall.—2 D. &  
E. 18.—7 D.  
& E. 162.

8 D. & E.  
284, Rex v.  
Swallow.—  
6 D. & E. 76.

1 D. & E.  
648 n.

Cowp. 241,  
Rex v. Kemp-  
ton.

Stuart v.  
Hamilton, 2  
Hen. & Mun.  
48, 56.

8 D. & E.  
688, 690, Rex  
v. Smith.

2 Dougl. 486,  
Rex v. Read.

8 D. & E.  
220, Rex v.  
Clarke

tified and the justice wrote down his testimony, but did not state he testified in the deft's. presence; then the justice read this deposition or testimony in the deft's. presence, and the witness affirmed it. Held, not sufficient; it gave not to the deft. a sufficient opportunity to cross-examine &c., and the court said the witness ought to have been resworn in the deft's. presence.

§ 4. But in such cases if the deft. confess the charge, the irregularity is cured. May be the informer came &c., preterperfect tense. Rex v. Thompson.

And in such convictions, if the deft. appear and plead, and the evidence be given on the same day, the court will intend the evidence was given in the deft's. presence.

§ 5. And this, though it be stated that his appearance was at A, and the evidence was given at B.

Same rule, the conviction must state the evidence was given in the deft's. presence; and if it do not, it is a good objection.

Lord Kenyon said, he was always dissatisfied with one point in Rex v. Thompson, namely, that the court would in any case intend that the evidence was given in the deft's. presence, without its so appearing on the face of the conviction.

§ 6. It is sufficient if enough appears to shew the evidence was given in the deft's. presence, without stating he was actually present at the time.

§ 7. A judgment ought never to be given in a summary manner in the plt's. favour, unless he fully brings his case within the statute under which he proceeds.

ART. 11. *Evidence, how viewed.*

§ 1. Where a statute gives power of conviction to a magistrate, he is the sole judge of the weight of the evidence given before him, and the court of K. B. will not examine whether he has drawn a right conclusion from it, but if no evidence at all appears on the conviction to support a material part of the information, this court will quash the conviction. But "if any evidence whatever (however slight)" had appeared to establish this point (sale of bread to Robert Chappell) the magistrate had the sole right to draw his conclusion &c.

§ 2. It is indispensably necessary the conviction state the evidence, and it is void if it do not do it. It only stated, that witnesses were examined on oath, the deft. neglected to appear or attend after being summoned, and that he, the justice, considered the evidence &c.

§ 3. Also held, that the magistrate ought to state in his conviction the whole of the evidence for and against the deft.; but convictions stating the evidence generally, have been holden good. p. 222 n., though not approved.

ART. 12. *Curses &c. uttered ought to be stated.*

§ 1. In every conviction for swearing and cursing, the oaths and curses must be stated. The conviction stated the deft. did profanely swear fifty-four oaths, and profanely curse 160 curses, *contra formam statuti*, and that the witnesses being sworn did depose the deft. swore fifty-four oaths and 160 curses, and the deft. being summoned and heard, the justice adjudged him to be guilty of the premises, and to forfeit £21 8s. was at 2s. an oath, bad also, because the conviction did not state the deft. was not a servant &c. "For what is a profane oath or curse is matter of law, and ought not to be left to the judgment of the witness." Conviction quashed.

CH. 221.

Art. 13.

1 Stra. 497,  
498, Rex v.  
Sparling.—  
And 2 Ld.  
Raym. 1369.

§ 2. But in this case the deft. was convicted on 6 & 7 W. III. c. 1, for swearing 100 oaths, viz. by G—d, and 100 curses, viz. G—d d—you. Objections, these ought to have been stated 100 times, each particularly. But held, it is sufficient to state he swore such an oath or made such a curse 100 times; and proceedings on convictions must be in the present tense. In convictions it is ill for the witness to swear the deft. is guilty of the premises, for that was taking on himself to swear the law.

Str. 608,  
Rex v. Rob-  
erts.

1 Stra. 316,  
Rex v. Baker.

§ 3. It is considered as a general principle of law in these cases, that where justices have power to convict on the oath of one or more witnesses, they may convict on the confession of the party.

1 Stra. 546,  
Rex v. Gage.

§ 4. Where a penal state empowers justices to distribute the penalty on conviction among several persons, they ought to adjudge the several proportions particularly. So where they may allow reasonable charges, they ought to ascertain the amount in the conviction.

2 D. & E. 96.  
1 East, 189.—  
6 D. & E.  
538.

#### ART. 13. *Exceptions and provisos in statutes.*

§ 1. Held, a summary conviction for any offence created by statute must negative every exception contained in the clause creating the offence. This is not merely want of form, and this is according to the general rule stated in another place. And Lord Kenyon said, "the only cases where this is not necessary to be done, were, where the exception was introduced in a subsequent clause, and there it must come by way of defence on the part of the deft."

8 D. & E.  
542, 544, Rex  
v. Jukes & al.

§ 2. An excuse under a *proviso* need not be taken notice of in a conviction, where the *proviso* is not in the enacting clause.

2 Stra. 1101,  
Rex v. Bryan.

§ 3. This was a conviction for keeping an alehouse without license. Objected, that in the statute there is a *proviso* to exempt persons punished by a former statute; hence the conviction should have stated the deft. had not been so punished; but held, this matter "coming in by way of *proviso*, he should have insisted on it in his defence."

1 Stra. 555,  
Rex v. Ford.

CH. 221. § 4. This was a conviction on 22 Car. II., therefore the  
 Art. 14. prosecutor need not have negatived any of the exceptions in  
 1 W. & M. c. 18, (an after act) and as he had negatived a  
 part of them these might be rejected as surplussage. 1 D. &  
 E. 320, Rex v. Hall.

6 D. & E. An information founded on a penal statute must negative the  
 559, 560, Rex exceptions in the enacting clause creating the penalty; also,  
 v. Frauten. those contained in a former clause to which the enacting  
 clause refers in express terms.

7 East, 146, § 5. Every conviction must state the prosecution and con-  
 Rex v. Wood- viction to be within the time limited by law.  
 sock.

ART. 14. *Judgments or adjudications.*

§ 1. In every conviction there must be a regular judgment  
 or adjudication, the only question is, what is such.

2 D. & E. 18, § 2. In this case the conviction set forth the evidence and  
 Rex v. then stated, "thereupon the deft. on — at — before me  
 Thompson. — by oath of one credible witness, according to the form  
 of the statute, is convicted." Held, this was an adjudication  
 by the justice that he is convicted of the offence.

2 D. & E. 96, § 3. In this conviction held, where justices of the peace are  
 Rex v. 97, required by penal statute to distribute the penalty on conviction  
 Dempsey. among certain persons according to their discretion; and  
 adjudication, the forfeiture be disposed of as the law directs,  
 is bad. The justices ought to have adjudged what the several  
 proportions should be; "and a judgment is one entire  
 thing, and one part of it cannot be given at one time and  
 another at a subsequent period. The distribution of the pen-  
 alty is a part of the judgment, and it ought to appear on the  
 record."

1 East, 189, § 4. Where a statute gives power, in a summary proceeding  
 Rex v. Sym- and conviction, to a magistrate to award the reasonable charges  
 monda. of taking a distress, he must ascertain the amount in the con-  
 viction, and an adjudication that the deft. shall pay the rea-  
 sonable charges of the levy is bad.

6 D. & E. § 5. The deft. was convicted in the penalty of 10s. on  
 538, Rex v. the mutiny act. The act directed part of the penalty to be  
 Priest. paid to the overseers of the poor of the parish where the  
 offence is committed, for the use of the poor of said parish.  
 The justice adjudged this part to be paid to the overseers of  
 the poor of a township; held, this adjudication could not be  
 supported. And Lord Kenyon said, that "every thing neces-  
 sary to support a conviction, should appear on the conviction  
 itself."

2 Stra. 900, § 6. The deft. was convicted on a Turnpike act, for refus-  
 Rex v. Cath- ing to account for and pay over the tolls he had collected;—  
 erall. conviction quashed, because no particular sum was specified,  
 or the times when the money was charged to be received, so

as to enable him to defend himself on a second charge. The trustees wished the conviction to stand as to the non-accounting, but the court said it was *one entire nonfeasance* charged both in the conviction and commitment, and they would not sever them. CH. 221.  
Art. 15.

§ 7. A person can commit but one offence on the same day, by exercising his ordinary calling on a Sunday. See *Crepps v. Durden & al.*

§ 8. A statute directs one convicted of an offence by a justice, shall suffer imprisonment for want of a sufficient distress to satisfy a penalty he incurs on conviction. The justice, before he issues a warrant for his commitment, must state on the conviction, that he has not such distress, and enter an adjudication that he be imprisoned. 1 Ld. Raym.:  
545, *Rex v. Chandler.*

§ 9. *Separate penalties.* The deft. may be convicted of several offences in the same conviction,—three offences of the same kind committed on three several days. 8 D. & E.  
286, *Rex v. Swallow.*

ART. 15. *Attainder.*

§ 1. Under this act of attainder, there have been several adjudications on the principles of the American revolution. New York  
Act, Oct. 22,  
1779.

§ 2. The wife of a person attainted under this act, was entitled to dower out of the estate of her husband, which had become forfeited in virtue of this act of forfeiture and attainder. 1 Johns. Cas.  
27, *Palmer v. Horton.*

§ 3. Where a person was convicted under this act for adhering to the enemies of the State, and all his property, real and personal, was declared to be forfeited; held, he could not, after his return to the State, maintain an action for rent which had accrued prior to the 22d of October, 1779; and of course he could not set it off. 2 Johns. Cas.  
236, *Sleight v. Kane.*

§ 4. A person named Joshua Temple De St. Croix, was convicted and attainted under this act by the name of Joshua De St. Croix; held, the proceedings under this act were to be governed by the rules in cases of attainder, and not by the ordinary course of judicial proceedings; that the conviction contained an imperfect or incomplete description of the person, which might be supplied by proof; and that the identity of the person was a matter of fact to be ascertained by the jury. But otherwise where the description of the person is false or repugnant to truth. 2 Johns. Cas.  
267, *Jackson v. Sands.*

§ 5. By this act of October, 1779, estates on condition did not vest in the people or become forfeited. A on — bought lands at a sheriff's sale, but did not pay for them, and till payment the deed was delivered as an *escrow*. A was afterwards attainted, not having performed the condition. Held, the State of New York could not in 1788, by paying the consideration, perform the conditions of the sale, so as to vest Jackson v.  
Catlin, 2  
Johns. R.  
248, 264;  
and 8 Johns.  
R. 520, 557;  
same case in  
error —  
Statute, 22d  
of Oct. 1779.  
—3 Caines, 61.

CH. 221. the title to the land in A ; also held, A so attainted was *civili-  
 Art. 16. liter mortuus*. The attainder in this case, as in any other, could operate only on the estate A had at the time of the attainder ; and that was in fact no estate or title in these lands ; but the title remained in the original debtor, necessarily, until the deed constituting the sale and change of property was completed, by a final delivery to the purchaser A ; and the treaty of peace in 1783, found the title of this estate in the original debtor, not in A. Here was attainder without judgment of death.

2 Johns. R.  
 151, Jackson  
 v. Stokes &  
 al.

§ 6. So in this the person whose estate was confiscated by this act of October 22, 1779, actually died in June, 1777. Before that time he removed within the British line, within the State of New York, from those parts of it which remained in possession of the Americans. May the 5th, 1780, was presented by the grand jury, and indicted under this act, for an offence alleged to have been committed April 15, 1777, and was convicted, and judgment was signed July 14, 1783, after the treaty of peace was signed, as a provisional treaty, and before the definitive treaty of peace was signed, and the estate adjudged forfeited, and was sold. Ejectment was brought against those who derived title under the sale made by the commissioners of forfeitures ; and held the proceedings were regular, and according to the act, and the judgment valid. And clearly it must have been valid, solely on *revolutionary* principles ; for on the settled principles of our system of government, no legislature can pass an act to attain a man and confiscate his estate after he is dead, and his estate actually descended to, and vested in his heirs at law. The court observed, the constitution authorized the legislature to pass bills of attainder for crimes committed during the revolutionary war. See Estate by Forfeiture, Ch. 136.

ART. 16. *Other cases.*

1 Dallas, 393,  
 404, Camp v.  
 Lockwood.

§ 1. Under a statute of the legislature of Connecticut, of May 1778, the estate of the plt. was confiscated in the American revolutionary war for his adhering to the British government. Held, in Pennsylvania, he could not sue there to recover a debt vested by that confiscation in the State of Connecticut, though no proceedings were had on the part of that State to reduce the debt into possession before the treaty of peace. In this case the statute itself, on our revolutionary principles, confiscated this debt, and vested it in the State ; this was a common practice in that revolution. This was the operation of Massachusetts conspirator act &c. mentioned in a former chapter. Almost every State confiscated personal property and debts in this way in that revolution, and in several cases lands and real estate. It will be observed in this

case, that the deft. barred the plt's. action, by pleading the debt sued for was vested in Connecticut, a third party; under which he did not claim.

CH. 221.  
Art. 16.

§ 2. By the confiscation acts in Maryland, passed in this revolution, the equitable interests of British subjects were also confiscated without office found, or entry, or other act done, though such equitable interests were not discovered till after the peace of 1783. Also held in this case, that a writ of error lay to the highest court in the State, when the question was, if a confiscation under the State statute was complete before this treaty of peace.

6 Cranch,  
286, Smith v.  
Maryland  
State.

Held, the confiscation acts of the State of Georgia are not repugnant to the constitution. *Cooper v. Telfair*.

4 Dallas, 14,  
20.

§ 3. Nor was the act of that State, confiscating the mortgagor's estate, any bar to the claim of the mortgagee, a British merchant, whose debt was only sequestered during the American revolutionary war; for only the estate of the mortgagor was confiscated, not that of the mortgagee: 2. If a confiscating statute of a State, independent of this treaty of peace, could be construed to destroy the claim of a British mortgagee, this treaty of peace reinstated the *lien* in its full force, and a subsequent sale of the estate could only pass it with its incumbrances.

4 Cranch,  
415, Higgin-  
son v. Mein.

§ 4. By this provision in the constitution of the United States, "no bill of attainder, or *ex post facto* law, shall be passed." The same principle as to attainder is understood to pervade the American system of government. In some State constitutions it is expressed as in that of Maryland, in these words, "that no law, to attain particular persons of treason or felony, ought to be made in any case, or any time, hereafter." Declaration of Rights, p. 16.

Art. 1, sect.  
9, Constitu-  
tion United  
States.

§ 5. *Where the thief's conviction does not divest the owner's property.* Towne brought trover for a pair of oxen against Collins, who innocently bought them of the thief, and recovered, though Hutchins, the thief, had been convicted, and sentenced to pay three-fold damages, these not being paid to the plt., whose only agency in the prosecution was procuring the thief to be arrested, and attending the trial as a witness, when summoned. Held, no market overt exists in Massachusetts.

Essex, Nov.  
Term, 1786,  
Towne v.  
Collins.

§ 6. Forfeiture, by confiscation, of an absentee's estate in Connecticut, for adhering to the king in the American revolution; and held, this did not discharge him from his debts, though admitted by the commissioners on forfeited estates: 2. Held, the creditors could waive that benefit, or if received, could sue the debtor for the part not paid: 3. The confiscation acts did not render the party *civiliter mortuus*, he is

Kirby, 228,  
Marks v.  
Johnson;  
and id. 291.

CH. 221. still capable of acquiring property, and of holding any he  
*Art. 17.* might have out of the State: 4. It leaves him personally  
 liable for his antecedent debts, until in fact paid.

*ART. 17. Judgments &c.*

Loft, 400,  
654.—Dallas,  
450.

§ 1. Judgment for corporal punishment is not to be pronounced against a person in his absence; and judgment relates to the first day of the term.

1 Wils. 163,  
Rex v. Hunter.

§ 2. Judgment was regularly signed in this criminal cause. Moved by the deft. to set it aside on payment of costs, pleading the general issue, and taking short notice of trial: *per curiam*, it is never done in criminal causes.

3 Salk. 213.  
—1 W. Bl. 37  
Rex v.  
Dawes.

§ 3. Every judgment must be complete and formal. Two young students in Oxford College were convicted on information of treasonable words, and punished by the vice-chancellor in an academical way; then sentenced by B. R. to pay fines, to be imprisoned, &c.

1 Dallas, 462,  
Thompson,  
in error, v.  
Musser.

§ 4. If a verdict be good, a judgment entered upon it generally, must be so likewise; for when drawn at large it may be put into form. Strict form in it is not necessary.

§ 5. Judgments in many cases, generally civil and *qui tam*, Ch. 146, and motions in arrest of judgments. The same chapters in civil causes, except judgment arrested in one criminal case there stated, as Woods' case. General principles of judgments and of arrests thereof, there considered.

1 W. Bl. 291,  
360, Rex v.  
Scott &  
Ham.

§ 6. *Arresting judgments.* Five defts. were indicted for a riot and assault. The jury acquitted all but two, insisted on that this was an acquittal of all, as two cannot commit a riot; but on shewing cause it appeared two died before trial and were not acquitted; and the verdict found two guilty of a riot. Judgment not arrested. And the case states, "the court will suppose every thing in order to support" the indictment, as the verdict found two guilty and two others were dead, "the court will intend that the jury had evidence that one at least of the dead men was concerned in" the riot. This decision seems, however, to clash in some degree with the general rule of law, which is, that the court will intend nothing to support criminal proceedings. And here too there was no room to suppose the jury found one of the dead men guilty of a riot, unless it be also supposed the jury undertook to know the law, that there must be three to make a riot. But why suppose this? As it was not the jury's province to know the law, and if not, they might well find two guilty of a riot, not knowing the law, and so might well think two might make a riot, and so find two guilty of one, though no evidence a third was concerned.

2 Ld. Raym.  
1221, Queen  
v. Deman—  
1 W. Bl. 209.—2 Burr. 930, Rex v. Spraggs.

§ 7. On an indictment the deft. may move in arrest of judgment after a judgment by default, but not after judgment

upon demurrer. The deft. must appear in person to move in arrest of judgment. And so if the conviction be removed by *certiorari*. CH. 221.  
Art. 17.

§ 8. Information against deft. for illegal exactions in his office of clerk of the market. It contained several distinct charges, as to which he was acquitted, but at the close of the information there was a general charge of which he was found guilty, viz. "that under colour of his said office he did illegally cause his agents to demand and receive of several other persons several other sums of money, on pretence of weighing and examining their several weights and measures." Judgment arrested, because this charge was too general, so general that the deft. cannot prepare to defend against it, or have the benefit of pleading it in bar to another prosecution. 2 Stra. 999,  
Rex v. Robe.

§ 9. The deft. was convicted, and judgment was arrested, because it did not appear the jury who tried the cause was sworn in the county, the words, *then and there*, being omitted in swearing the jury. 2 Stra. 901,  
Rex v. Morris.

§ 10. The deft. in capital or other cases may in person move in arrest of judgment any legal exceptions to the indictment, as want of sufficient certainty in stating the offence, the time, place, or person, and "if the objections be valid the whole proceedings shall be set aside; but the party may be indicted again." None of the statutes of *jeofails*, as stated formerly, extend to indictments, or proceedings in criminal cases. Hence a defective indictment is not aided by verdict, and in favour of life great strictness is always observed. Pardon is also pleadable in arrest of judgment; and praying benefit of clergy or commutation thereof, may be ranked under the same head. 4 Bl. Com.  
368.

§ 11. Information on two statutes for the same offence, and for two penalties on those acts. Verdict against the deft., and one is bad, judgment must be arrested *in toto*. Bun. 286,  
296, Rex v.  
Rosevere.

§ 12. The deft. on an indictment may move in arrest of judgment any time before judgment is signed. Stra. 843,  
Rex v. Hays.

§ 13. A. D. 1810, the General Court in Virginia decided, "that it could give judgment for a fine in the absence of the deft.; but that in no case except by statute could it give judgment of imprisonment or other corporal punishment, unless he was present in court." This is the settled distinction. Virginia Cas.  
172, 175,  
Common-  
wealth v.  
Cramp.



## CHAPTER CCXXII.

## IMPEACHMENTS.

As to Defects and Amendments, Forfeitures, Error, Reprieve and Pardons, &c. in criminal cases, see those heads.

We now come to another branch of the law in this work, that is, impeachments; so far penal and criminal as the object of the impeachment is to convict and remove from office, and often to disqualify to hold offices.

ART. 1. *Constitutional articles.*

§ 1. These constitute a very valuable part of our Federal and State constitutions, both in theory and practice.

Constitution  
of the United  
States.

§ 2. By art. 1, sect. 2 of the constitution, the House of Representatives has "the sole power of impeachment." By the same article, sect. 3, "the Senate shall have the sole power to try all impeachments; when sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside. And no person shall be convicted without the concurrence of two thirds of the members present. Judgment in cases of impeachment shall not extend further than from removal from office, and disqualification to hold and enjoy any office of honour, trust, or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law."

Art. 2, sect. 4, provides, "the president, vice-president, and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of treason, bribery, or other high crimes and misdemeanors."

Art. 3, sect. 2 This provides, that "the trial of all crimes, except in cases of impeachment shall be by jury," (implying impeachment cases are cases of crimes.)

Art. 1, sect. 3, speaking of impeachment, says, "and no person shall be convicted, without the concurrence of two thirds of the members present," in the Senate. So the term *conviction*, which ever implies criminally, is used several times in the Federal constitution connected with impeachments.

§ 3. In almost every State constitution that has been formed since the commencement of the American revolution there has been included a similar provision. This power of impeachment, of removal from office, and disqualification for

mal-conduct, is nearly universal in our system of government. But there is, and ever has been, some diversity in the exercise of it. But in this respect the mode of exercising it in the government of the United States is, and long has been imitated by a majority of the individual States ; that is, the House of Representatives, the popular branch in the legislature, has been and is the grand inquest to make the impeachment, and the Senate or senatorial branch is, and has been the tribunal to try it ; varying, however, some in the detail, though not in substance. In the constitution of New Hampshire this provision is well and fully expressed ; and it will be enough to recite this to shew the provision, in substance, in each State constitution, which has thus adopted the same mode nearly, that is, such house to impeach and such senate to try and decide.

CH. 222.  
Art. 1.

§ 4. Part 2 of this constitution provides, that “ the House of Representatives shall be the grand inquest of the State, and all impeachments made by them shall be heard and tried by the Senate.” And “ the Senate shall be a court with full power and authority to try and determine all impeachments made by the House of Representatives against any officer or officers of the State, for bribery, corruption, mal-practice, or mal-administration in office ; with full power to issue summons or compulsory process, for conveying witnesses before them. But previous to the trial of any such impeachment, the members of the Senate shall respectively be sworn truly and impartially to try and determine the charge in question, according to evidence. And every officer impeached for bribery, corruption, mal-practice, or mal-administration in office, shall be served with an attested copy of the impeachment, and order of Senate thereon, with such citation as the Senate may direct, setting forth the time and place of their sitting to try the impeachment ; which service shall be made by the sheriff, or such other sworn officer as the Senate may appoint, at least fourteen days before the time of trial ; and such citation being duly served and returned, the Senate may proceed in the hearing of the impeachment, giving the person impeached (if he shall appear) full liberty of producing witnesses and proofs, and of making his defence by himself and counsel, and may also, upon his refusing or neglecting to appear, hear the proofs in support of the impeachment, and render judgment thereon, his non-appearance notwithstanding ; and such judgment shall have the same force and effect as if the person impeached had appeared and pleaded in the trial. Their judgment, however, shall not extend further than removal from office, disqualification to hold or enjoy any place of honour, trust, or profit, under the state ; but the party so convicted shall never-

Constitution  
of New  
Hampshire.

CH. 222. theless be liable to indictment, trial, judgment, and punishment according to the laws of the land." "Whenever the Art. 1. governor shall be impeached, the Chief Justice of the Supreme Judicial Court shall, during the trial, preside in the Senate, but have no vote therein."

These articles in the New Hampshire constitution were substantially taken from the Federal constitution, as well as those generally in the State constitutions, adopted since that was. And the said articles in the constitution of the United States, were adopted from the constitution of Massachusetts. Each State that has established the prosecution by *impeachment*, has made the popular branch in the legislature the grand inquest to impeach officers for corruption, and mal-administration in office, even Virginia. But this State, in her constitution, has provided, that such impeachment shall be prosecuted by the Attorney General, or such other person or persons as the House may appoint in the General Court, according to the laws of the land; if found guilty, to be disabled to hold any office under government, or be removed from such office *pro tempore*, or subjected to such pains and penalties as the laws shall direct. And if any of the judges of the General Court, on good grounds, (to be judged of by the House of Delegates,) be accused of any of the said crimes or offences, such House may, in like manner, impeach the judge or judges so accused, to be prosecuted in the Court of Appeals, to be punished in the same manner.

Maryland  
Constitution.

The constitution of North Carolina provides, that the Governor, and other officers, offending against the State, by violating any part of the constitution, mal-administration, or corruption, may be prosecuted on the impeachment of the General Assembly, or presentment of the grand jury of any court of supreme jurisdiction in this State. In Maryland misbehaviour in office is indictable.

§ 5. On the whole, with a very few exceptions, the principles and modes of impeachments, adopted in the constitution of the United States, have been adopted in all the individual States; and in many cases on much consideration and experience.

Hunt's case.

§ 6. There have been many impeachments upon these constitutional provisions in the several States. In Massachusetts, in 1794, William Hunt, a justice of the peace, was impeached by the House of Representatives, before the Senate, for mal-practice in his office of such justice, among other things, because he acted as counsel for the plt., and filled out his writ for him in an action, which he heard and tried as such justice; and for this, and other acts of mal-practice in office, there was judgment of removal from it, and of disqualification.

§ 7. Some years before, (about 1788,) sheriff Greenleaf was impeached by the same House of Representatives, and in the same manner, for mal-practice in the office of sheriff. Сн. 222.  
Art. 2.

ART. 2. § 1. But the great and important case of impeachment was that of Judge Chase, a judge of the Supreme Court of the United States, by the House of Representatives in Congress, before the Senate. In this every principle and matter of form were well attended to and considered. Among the counsel and judges there were some of the first lawyers of the country. And in a full examination of this case, occupying, as reported, above five hundred common pages, we find many very material points stated as to treason and libels, the power of juries as to deciding the law in criminal cases, and as to the admission of evidence, &c. It will be my object in this, and several following articles, to state these points, and the material matters appertaining to them. They are the more valuable as they are purely American. In this case several judicial decisions, of value and importance, will be found, as in the cases of Vigol, Mitchell, Fries, &c. &c. But the useful matter in this case is not generally to be collected from direct decisions, but from the admissions of the parties, and their eminent counsel, and by inference from the decisions of the Senate on the eight articles of impeachment. Impeachment of Judge Chase, A. D 1805, U. States v. Samuel Chase.

§ 2. The impeachment against Judge Chase was for high crimes and misdemeanors. The substance of which was : Impeachment.  
Art. 1 charged, that he "on the trial of John Fries, charged with high treason, before the Circuit Court of the United States, held for the district of Pennsylvania, in the city of Philadelphia, during the months of April and May," 1800, "whereat the said Samuel Chase presided, did, in his judicial capacity, conduct himself in a manner highly arbitrary, oppressive, and unjust, viz : 1. In delivering an opinion in writing, on the question of law, on the construction of which the defence of the accused materially depended, intending to prejudice the minds of the jury against the case of the said John Fries, the prisoner, *before* counsel had been heard in his defence." 2. "In restricting the counsel for the said Fries from recurring to such English authorities as they believed apposite, or from citing certain statutes of the United States, which they deemed illustrative of the positions upon which they intended to rest the defence of their client."

§ 3. 3d. "In debarring the prisoner from his constitutional privilege of addressing the jury, (through his counsel,) on the *law* as well as on the *fact*, which was to determine his guilt, or his innocence, and at the same time endeavouring to wrest from the jury their indisputable right to hear arguments, and to determine upon the question of law, as well as the

CH. 222. question of fact, involved in the verdict which they were required to give."  
 Art. 2.

§ 4. Art. 2 charged, that he, at a Circuit Court, held at Richmond in May, 1800, &c. whereat he presided, and "before which a certain James Thompson Callender was arraigned, for a libel on John Adams, then president of the United States, the said Samuel Chase, with intent to oppress, and procure the conviction of the said Callender, did overrule the objections of John Basset, one of the jury, who wished to be excused from serving on the said trial, because he had made up his mind as to the publication, from which the words charged to be libellous in the indictment were extracted; and the said Basset was sworn accordingly, and did serve on the jury, by whose verdict the prisoner was subsequently convicted."

§ 5. Art. 3, in the impeachment, charged, "that with intent to oppress, and procure the conviction of, the prisoner, the evidence of John Taylor, a material witness on behalf of the aforesaid Callender, was not permitted, by the said Samuel Chase, to be given in, on pretence that the said witness could not prove the truth of the whole of one of the charges contained in the indictment, although the said charge embraced more than one fact."

§ 6. Art. 4, in the impeachment, charged, "that the conduct of the said Samuel Chase was marked, during the whole course of the said trial, by manifest injustice, partiality, and intemperance, viz: 1. In compelling the prisoner's counsel to reduce to writing, and submit to the inspection of the court, for their admission or rejection, all questions which the said counsel meant to propound to the above named John Taylor, the witness."

§ 7. 2d. "In refusing to postpone the trial, although an affidavit was regularly filed, stating the absence of material witnesses on behalf of the accused; and although it was manifest, that, with the utmost diligence, the attendance of such witnesses could not have been procured at that term."

§ 8. 3d. "In the use of unusual, rude, and contemptuous expressions, towards the prisoner's counsel; and in falsely insinuating that they wished to excite the public fears and indignation, and to produce that insubordination to law, to which the conduct of the judge did, at the same time, manifestly tend."

§ 9. 4th. In repeated vexatious interruptions of the said counsel, on the part of the said judge, which at length induced them to abandon their cause and their client, who was thereupon convicted, and condemned to fine and imprisonment."

§ 10. 5th. "In an indecent solicitude, manifested by the said Samuel Chase, for the conviction of the accused, unbe-

coming even a public prosecutor, but highly disgraceful to the character of a judge, as it was subversive of justice."

CH. 222.

Art. 2.

§ 11. Art. 5, in the impeachment, charged, that "whereas it is provided by the act of Congress, passed" September 24, 1789, "entitled, an act to establish the judicial courts of the United States, that for any crime or offence against the United States, the offender may be arrested, imprisoned, or bailed, agreeably to the usual mode of process in the State in which such offender may be found; and whereas it is provided, by the laws of Virginia, that upon presentment by any grand jury of an offence not capital, the court shall order the clerk to issue a summons against the person or persons offending, to appear and answer such presentment at the next court; yet the said Samuel Chase did, at the court aforesaid, award a *capias* against the body of the said James Thompson Callender, indicted for an offence not capital, whereupon the said Callender was arrested, and committed to close custody, contrary to the law in that case made and provided."

§ 12. Art. 6, in the impeachment, charged, that, "and whereas it is provided, by the 24th section of the act aforesaid, entitled, an act to establish the judicial courts of the United States, that the laws of the several States, except where the constitution, treaties, or statutes, of the United States shall otherwise require or provide, shall be regarded as the rules of decisions in trials at common law, in the courts of the United States, in cases where they apply; and whereas, by the laws of Virginia, it is provided, in all cases, not capital, the offender shall not be held to answer any presentment of a grand jury, until the court next succeeding that during which such presentment shall be made, yet the said Samuel Chase, with intent to oppress and procure the conviction of the said James Thompson Callender, did, at the court aforesaid, rule and adjudge the said Callender to trial during the term at which he, the said Callender, was presented and indicted, contrary to law in that case made and provided."

§ 13. Art. 7, in the impeachment, charged, that at the Circuit Court &c. for the district of Delaware, held at Newcastle, in June 1800, whereat he presided, he "disregarding the duties of his office, did descend from the dignity of a judge, and stoop to the level of an informer, by refusing to discharge the grand jury, although intreated by several of the said jury so to do, and after the said grand jury had regularly declared, through their foreman, that they had found no bills of indictment, nor had any presentments to make, by observing to the said grand jury, that he, the said Samuel Chase, understood that a highly seditious temper had manifested itself in the State of Delaware, among a certain class of people, particu-

CH. 222.

Art. 2.



larly in Newcastle county, and more especially in the town of Wilmington, where lived a most seditious printer, unrestrained by any principle of virtue, and regardless of social order; that the name of this printer was —, but checking himself, as if sensible of the indecorum which he was committing, added, that it might be assuming too much to mention the name of this printer, but it becomes your duty, gentlemen, to inquire diligently into this matter; or words to that effect; and that with intention to procure the prosecution of the printer, in question, the said Samuel Chase did, moreover, authoritatively enjoin on the district attorney of the United States, the necessity of procuring a file of the papers to which he alluded, (and which were understood to be those published under the title of *Mirror of the Times and General Advertiser*,) and by a strict examination of them to find some passage which might furnish the groundwork of a prosecution against the printer of the said paper; thereby degrading his high judicial functions, and tending to impair the public confidence in, and respect for, the tribunals of justice, so essential to the general welfare."

§ 14. Art. 8, in the impeachment, charged, that "whereas a mutual respect and confidence between the government of the United States and those of the individual States, and between the people and those governments respectively, are highly conducive to that public harmony, without which there can be no public happiness, yet the said Samuel Chase, disregarding the duties and dignity of his judicial character, did, at the Circuit Court for the district of Maryland, held at Baltimore, in the month of May 1803, pervert his official right and duty, to address the grand jury then and there assembled, on the matters coming within the province of the said jury, for the purpose of delivering to the said grand jury an intemperate and inflammatory political harangue, with intent to excite the fears and resentment of the said grand jury, and of the good people of Maryland against their State government and constitution; a conduct highly censurable in any, but peculiarly indecent and unbecoming in a judge of the Supreme Court of the United States; and moreover, that the said Samuel Chase, then and there, under a pretence of exercising his judicial right to address the said grand jury, as aforesaid, did, in a manner highly unwarrantable, to excite the odium of the said grand jury, and of the good people of Maryland, against the government of the United States, by delivering opinions, which,—even if the judicial authority were competent to their expression on a suitable occasion, in a proper manner,—were at that time, and as delivered by him, highly indecent, extrajudicial, and tending to prostitute the high judicial character

with which he was invested, to the low purpose of an electioneering partisan." CH. 222.  
Art. 3.

§ 15. The House of Representatives reserved liberty to exhibit any further articles or other accusation, or impeachment, against him; also to reply to his answers, and of offering proof, &c. and demanded he be put to answer to said crimes and misdemeanors, "and that such proceedings, examinations, trials, and judgments, may be thereupon had and given as are agreeable to law and justice."

Perhaps there never was an impeachment which involved more matter, and more doubtful matter, than this did, especially the 7th and 8th articles, being thus, in many parts of it of a vague and doubtful character, the very words used in this impeachment became material; hence it became necessary generally to state the charges *verbatim*, in order to give a fair and correct idea of them.

ART. 3. § 1. The written answer of Judge Chase, especially to these charges, is well calculated to place them in a true point of view, and contains much valuable law on many important points in American jurisprudence. I shall therefore extract largely from this answer; and as to the most material points resulting therefrom, add some observations and authorities. This answer was filed "in the Senate of the United States, sitting as a High Court of Impeachment," February 4, 1805.

§ 2. "The United States *v.* Samuel Chase." His plea stated, he came in his proper person into the said court, and "protesting that there is no high crime or misdemeanor particularly alleged in the said articles of impeachment, to which he is, or can be, bound by law to make answer, and saving to himself now, and at all times hereafter, all benefits of exceptions to the insufficiency of the said articles, and each of them, and to the defects therein appearing in point of law, or otherwise; and protesting also that he ought not to be injured in any manner, by any words, or by any want of form in his answer, he submits the following facts, and observations, by way of answer to the said articles." He then cited the first article in said impeachment, also the three specific charges of misconduct, contained in it. As to these three, he admitted the holding of the court; that Fries was brought to trial in it, on an indictment for treason against the United States; that he was duly commissioned as a judge &c., presided &c., and was assisted by Richard Peters, district judge, &c. As to the opinion given in writing, mentioned in said first specific charge, Judge Chase cited the constitution of the United States, section 3, declaring that "treason against the United States shall consist only in levying war against them, or in ad-



CH. 222. hering to their enemies, giving them aid and comfort :” also  
 Art. 4. cited acts of Congress of March 3, 1791, and of May 8, 1792, laying a duty on spirits distilled within the United States, and on stills, and decisions thereon in the cases of Vigol and Mitchell, to shew that it is treason to obstruct, with force and violence, the execution of a particular law of the United States, of a public nature.

Vigol's case. § 3. In 1794, an insurrection took place in the four Western counties of Pennsylvania, to prevent by force the execution of those two acts, and in April, 1795, at a Circuit Court held in Philadelphia, by Judges Patterson and Peters, Vigol was, for being concerned in that insurrection, indicted for treason of levying war against the United States, by resisting and preventing by force the execution of said acts, and was convicted, and sentenced to death, and pardoned. In this case Vigol's counsel was William Lewis, Esq. (now one of Fries' counsel;) but he did not take the exception, nor raise the question of law, “whether resisting, and preventing by armed force, the execution of a particular law of the United States, be a levying war against the United States,” according to the true meaning of the constitution; though a decision in the negative of this question must have acquitted the prisoner.

Mitchell's case. § 4. But in this case of Mitchell, indicted for the same offence, this question was made, and argued on his part by his counsel, Lewis, &c. And the court decided, “that to resist, or prevent, by armed force, the execution of a particular law of the United States, is a levying of war against the United States, and consequently is treason within the true meaning of the constitution.” This decision became a precedent not suddenly to be departed from; and so a reason for viewing the law settled.

Fries' case. ART. 4. § 1. Judge Chase then cited the act of Congress of July 9, 1798, providing for a valuation of lands &c.; also the act of July 4, 1798, laying a direct tax; and stated, that in February and March, 1799, an insurrection took place in the counties of Bucks and Northampton, in Pennsylvania, to prevent by force the execution of these acts, and particularly the valuation act. Fries was arrested and committed as one of the ringleaders of this insurrection; and at a Circuit Court held in Philadelphia, in April, 1799, was brought to trial on an indictment for treason, by levying war against the United States, before Iredell and Peters, judges, and Lewis and Dallas were his counsel; they finding the facts alleged were fully proved, rested Fries' defence on a question of law. Decided as above, in the cases of Vigol and Mitchell. They contended, that to resist by force of arms a particular law of the United States, though a public one, did not amount to *levying*

war against the United States, within the true meaning of the constitution; hence it is not treason, but only a riot. After a very full discussion, the court decided, as in Mitchell's case, "that to resist or prevent, by force, the execution of a particular law of the United States, did amount to levying war against them," and so was treason. As in this case the facts were proved as laid, and a law question arose thereon, as to what was levying war, it may be useful to notice these facts, which amounted to treason by levying war. The indictment against Fries charged as in the subjoined note.\*

Ch. 222.  
Art. 4.

§ 2. This indictment was found April 16, 1800, and on it he, Fries, was arraigned, and found guilty of treason. And on this former indictment a new trial was granted, solely on the ground that one of the jurors of the *petit jury*, after he was

New trial,  
A. D. 1799.

\* "The grand inquest of the United States of America, in and for Pennsylvania District, upon their respective oaths and affirmations, do present, that John Fries, late of — &c. owing allegiance to the United States of America, wickedly devising and intending the peace and tranquillity of the said United States to disturb, and to prevent the execution of the laws thereof within the same; to wit, a law of the United States, entitled, "an act to provide for the valuation of lands &c., and also a law of the said United States, entitled, an act to lay and collect a direct tax within the United States, on the seventh day of March," 1799, "in the county of Northampton, in the State and district aforesaid, and within the jurisdiction of this court, wickedly and traitorously did intend to levy war against the United States, within the same, and to fulfil and bring to effect the said traitorous intention of him the said John Fries, he the said John Fries, afterwards, that is to say, on the said seventh day of March, in the year &c. in the said State, district, and county aforesaid, and within the jurisdiction of this court, with a great multitude of persons, whose names are to the said grand inquest unknown, a great number, to wit, to the number of one hundred persons and upwards, armed and arrayed in a warlike manner, that is to say, with guns, swords, and other warlike weapons, as well offensive as defensive, being then and there unlawfully and traitorously assembled, did traitorously assemble and combine against the said United States, and then and there with force and arms, wickedly and traitorously, and with the wicked and traitorous intention to oppose and prevent, by means of intimidation and violence, the execution of the said laws of the said United States, within the same, did array and dispose themselves in a warlike and hostile manner, against the said United States, and then and there, with force and arms, in pursuance of such their traitorous intention, he the said John Fries, with the said persons, so as aforesaid traitorously assembled, armed and arrayed in manner aforesaid, wickedly and traitorously did levy war against the said United States." There was a second count, stating Fries and the others opposed the *marshal* of the United States in and for said district, in the execution of his duty and office &c. There was also a third count, for *rescuing persons in his custody* &c. "And so the grand inquest aforesaid, upon their respective oaths and affirmations aforesaid, do say, that the said John Fries, as much as in him lay, did then and there, in pursuance and in execution of the said wicked and traitorous combination and intention, wickedly and traitorously, by means of force and intimidation, prevent the execution of the said law of the said United States, entitled, an act to provide for the valuation of lands and dwelling houses, and the enumeration of slaves within the United States, and the said law of the said United States, entitled, an act to lay and collect a direct tax within the United States, in the State and district aforesaid, contrary to the duty of his said allegiance, against the constitution, peace, and dignity of the said United States, and also against the form of the act of Congress of the United States, in such case made and provided." Signed, William Rawle, attorney of the United States for the Pennsylvania District.

Indictment  
against Fries,  
April, 1800.

CH. 222. summoned, but before he was sworn on the trial, "had made  
 Art. 4. some declaration unfavourable to the prisoner."

§ 3. The Circuit Court sat in Philadelphia in April and May, 1800, held by judges Chase and Peters, and on the said indictment Fries was arraigned the day it was found, and pleaded not guilty; his counsel, said Lewis and Dallas.

*The opinion of the court excepted to.* The court, it seems, on fully examining this indictment, found the question of law arising on it, the same as that above decided in the cases of Mitchell and Fries, his first trial. And the judges now, Chase and Peters, satisfied with it, and holding themselves bound by it, as sound, and conformable to the decisions in England, since the revolution of 1688, judge Chase drew up the opinion in writing, stated in the first specified charge, art. 1, in his impeachment. This opinion judge Peters approved. The opinion is material, and was thus in substance. "The constitutional definition of treason is a question of law. Every proposition in any statute, clear or obscure, is a question of law. What is the meaning of a statute, and if the case comes within it, is a question of law, and not of fact." "The question in an indictment for levying war against, (or adhering to the enemies of) the United States, is whether the facts stated do not amount to levying war." "It is the duty of the court in this, and in all criminal cases, to state to the jury their opinion of the law, arising on the facts; but the jury are to decide in the present and in all criminal cases both the law and the facts, on their consideration of the whole case." "Any insurrection or rising of any body of people within the United States, to attain or effect, by force or violence, any object of a great public nature, or of a public and general (or national) concern, is a levying war against the United States, within the contemplation and construction of the constitution of the United States" "That any such insurrection or rising to resist or prevent, by force or violence, the execution of any statute of the United States, for levying or collecting taxes, duties, imposts, or excises, or for any other purpose, (under any pretence, as that the statute was unequal, burthen-some, oppressive, or unconstitutional,) is a levying war against the United States, within the constitution;" and because this has a direct tendency to dissolve all the bonds of society, and to destroy all order, and all laws, and also all security for the lives, liberties, and property of the citizens of the United States. "Military weapons, (as guns, swords, &c.) are not necessary to make such insurrection or rising, amount to levying war: because numbers may supply the want of military weapons; and other instruments may effect the intended mischief. The legal guilt of levying war may be incurred without the use of military weapons or military array." "The

Art. 5, opinion of the court as to treason &c. and right of the court to decide the law.

First specified charge in the impeachment.

CH. 222.

Art. 5.

assembling of bodies of men, armed and arrayed in a warlike manner, for purposes only of a private nature, is not treason, although the judges and peace officers should be insulted and resisted; or even great outrages committed to the persons and property of our citizens." "The true criterion to determine whether acts committed are treason or a less offence, (as a riot,) is the *quo animo* the people did assemble. When the intention is universal or general, as to effect some object of a general public nature, it will be treason," not a riot. "If a body of people conspire, and meditate an insurrection to resist or oppose the execution of a statute of the United States by force, they are only guilty of a high misdemeanor; but if they proceed to carry such intention into execution by force, they are guilty of the treason of levying war; and the *quantum* of the force employed, neither lessens nor increases the crime,—whether by one hundred or one thousand persons, is wholly immaterial." "A combination or a conspiracy to levy war against the United States, is not treason, unless combined with an attempt to carry such combination or conspiracy into execution; some actual force or violence must be used in pursuance of such design to levy war; but it is altogether immaterial whether the force used is sufficient to effectuate the object, any force collected with the intention, will constitute the crime, of levying war."

It does not appear that any exception was taken to these opinions, as to their legality or correctness; but to the time of delivering them, that is, before the prisoner's counsel was heard on the question of law in his defence.

§ 2. To this charge Judge Chase answered, that he thought it best to communicate this opinion to Fries' counsel: 1. As the court considered itself bound by the above decisions, and especially that in Fries' first trial, being in the same case, no new evidence was expected, and if any should be offered, it would render this opinion inapplicable;—thought it was rendering Fries' counsel a service to apprize them beforehand of the court's opinion, to warn them in time of the necessity of "new testimony, which might vary the case, and take it out of the authority of former decisions:" 2. To save time, as there were above a hundred civil actions on the court's docket: 3. The court being bound by said former decisions, could not "alter its opinion in consequence of any argument;" as it was the duty of the court to charge the jury on the law, this opinion at some period must be made known to the jury by the court, "before they found their verdict;" and merely intimating it to the counsel before the trial, could make no material difference, though in the hearing of those who might be afterwards sworn on the jury. Lastly, it was the

CH. 222.

Art. 6.

duty of the court to guard the jury against erroneous impressions respecting the laws of the land, knowing it is their "right in criminal cases to give a general verdict of acquittal, which cannot be set aside on account of its being contrary to law, and that hence results the power of juries to decide on the laws as well as the facts in all criminal cases;" knowing also, "that in the exercise of this power it is the duty of the jury to govern themselves by the laws of the land, over which they have no dispensing power; and their right to expect and receive from our court all the assistance which it can give for rightly understanding the law;" and it is the sacred duty of the judges to give this assistance. The court further went on the ground, "that as the Federal legislature had the power to make, alter, or repeal laws, so the judiciary only had the power, and it was their duty, to declare, expound, and interpret the constitution and laws of the United States." And it seems the court did not deem it material in what stage of a cause the court intimated an opinion as to the law, which opinion must necessarily be declared to the jury and parties in some stage of it. Accordingly the court directed their clerk before the trial came on to make out three copies of the said opinion, one for the prisoner's counsel, one for the district attorney, "and one to the petit jury after they should have been impannelled, and heard the indictment read to them by the clerk, and after the district attorney should have stated to them the law on the overt acts alleged in the indictment." From this it is to be inferred the court intended this opinion should be delivered to the jury before they heard the evidence and arguments. If this opinion was correct, or really believed to be so by the court, there could not possibly be but one question as to the time of giving it, that is, did Judge Chase deliver it with fair and honest, or with corrupt views, with a view to a fair and legal trial, or to oppress and convict Fries. This was a question of evidence before the Senate, depending on a mass of loose evidence too voluminous to be attended to here. It may, however, generally be observed, that though Judge Chase in all the cases charged in the impeachment was certainly too unguarded, too sudden, too facetious, too witty and sarcastical, yet it is very difficult to discern the proof of corruption in the case.

Second specified charge as to British authorities.

• ART. 6. Second specified charge accused the respondent with "restricting the counsel for the said Fries from recurring to such English authorities as they believed apposite, or from citing certain statutes of the United States," they deemed useful &c. This charge also involved much important law. Judge Chase admitted he did express it as his opinion to the counsel for the prisoner, "that the decisions in England in cases of

indictments for treason at common law, against the person of the king, ought not to be read to the jury, on trials for treason under the constitution and statutes of the United States." But that he offered to admit to be so read any decisions on cases of treason in the courts in England since the revolution of 1688, for the purpose of shewing what acts have been considered by those courts, as a constructive levying of war against the king of that country in his legal capacity, but not against his person ; because levying war against his government was of the same nature as levying war against the government of the United States. But that such decisions nevertheless were not to be considered as authorities binding on the courts and juries of this country, but merely in the light of opinions entitled to great respect, as having been delivered after full consideration, by men of great legal learning and ability. These opinions as to the weight and application of English treason decisions here, are certainly those of every sound American lawyer ; still however, this restriction was exceptionable for a plain reason, the respondent admitted English treason cases since 1688. This was correct if those cases were not at all governed by those decided before 1688. But this is not the fact. In England treason cases decided since 1688, have ever been governed in some measure by those decided before ; because English judges and lawyers in modern trials of treason, invariably cite decisions in treason cases made anciently and before 1688, and as good authorities, then treason decisions in England since that period are in some good measure the same as those made before it, and of course partaking more of a star chamber character, than treason cases decided in America. This character is unfavourable to the accused, as English treason cases lean against him, and in favour of the king, especially where the treason has concerned his person. The district attorney would naturally read English cases against Fries, as authorities more full against him, even those since 1688, and if these were corrupted, as they are undoubtedly by precedents made before that time, it seems clearly to follow that Fries' counsel should have been permitted to shew this ; and to this purpose to read the ancient cases in order to shew their vicious character, incorporated in a degree into modern English decisions in cases of treason, in order to reduce to their proper weight those modern English cases, the district attorney read against Fries ; but if so, still this might well be an error of judgment, and not impeachable misbehaviour. Mere error of opinion is not corruption.

Ch. 222.  
Art. 7.

ART. 7. § 1. The court justly claimed a right to decide and direct, what evidence is proper to be admitted to be given to the jury, for the establishment of any matter of law or fact.

Court's power over the evidence &c.

СН. 222.

Art. 8.



And Judge Chase truly contended, that he was not bound on this impeachment to answer for the correctness of the principles he adopted, "but merely for the correctness of his motives in delivering them;" that a different rule would convert this court of impeachment into a court of appeals to try the correctness or incorrectness of honest decisions, and make the upright judge, mistaking the law, though with the best intentions, liable to be impeached and removed from office. "There can be no crime without criminal intention," and correctness of motives ought to be presumed till the contrary be proved. But he admitted an important principle his accusers contended for, that is, "that cases may be supposed, of an opinion delivered by a judge so palpably erroneous, unjust, and oppressive, as to preclude the possibility of its having proceeded from ignorance or mistake."

§ 2. In the trial of Fries, it is to be observed, the court directed the jurors to be asked, "whether they had ever formed or delivered an opinion as to his guilt or innocence." But in Callender's case this *or* was turned into *and*, as will be noticed in another place. (He peremptorily challenged thirty-five jurors.) After the evidence was adduced, Judge Chase charged the jury as usual, and stated many points of law of the first importance in cases of treason. He repeated most of the important matters contained in the said opinion, above cited, and added some matters, mostly stated Ch. 199, head of treason. But one matter merits notice here in the charge, the jury were told that if convinced, "that the real object and intent of the people assembled at Bethlehem, was of a public nature, which it certainly was,—if they assembled with intent to prevent the execution of both the above mentioned laws of Congress, or either of them,—it must then be proved to your satisfaction, that the prisoner at the bar incited, encouraged, promoted, or assisted in the insurrection or rising of the people at Bethlehem, and the terror they carried with them, with intent to oppose and prevent by means of intimidation and violence the execution of both of the above mentioned laws of Congress or either of them, and that some force was used by some of the people assembled at Bethlehem."

Must the offence be indictable &c.

ART. 8. § 1. Judge Chase in his defence under the first article of the impeachment, contended, "that no civil officer of the United States can be impeached, except for some offence for which he may be indicted at law, and that no evidence can be received on an impeachment, except such as on an indictment at law for the same offence would be admissible." This ground taken by the respondent occupied a large portion of the arguments on both sides; but his counsel did not insist on this ground, and most clearly it was not tenable. It was

agreed on all hands, that he was charged with misdemeanor in office ; that a misdemeanor in office, and misbehaviour in office, mean the same thing, and that this was a criminal prosecution. Now, though it is clear that a man may so misde-mean or misbehave in office as often to be guilty of an indictable offence, and he may often so misde-mean or misbehave in office as not to be guilty of an indictable offence, yet he is impeachable and removable for his misconduct in office ; to this purpose many cases were stated by the managers. One, suppose the President of the United States were to attempt to influence the votes of members of Congress upon a particular question, and should promise them offices, he would be impeachable clearly, but surely not indictable ;—another, “ habitual drunkenness in a judge is not an indictable offence ;” but the Senate removed from office Judge Pickering for this offence, on an impeachment ;—and another, the President of the United States has power to keep in his possession all laws which are presented to him for his signature for ten days ; suppose at a session constitutionally ending the 3d of March, he should under this power keep a large number of laws or bills, and return them to Congress on that day within twenty minutes of its dissolution, with his objections in writing to each of them, so that it would be impossible constitutionally to act upon them at such session, surely he would be impeachable for such misconduct in office, but not indictable.

CH. 222.

Art. 9.

ART. 9. But the counsel of Judge Chase contended for another principle not so clear ; that is, that the offence to be impeachable must be an offence against some known law. They argued, that this prosecution by impeachment clearly supposed an offence committed of which the accused may be convicted, and that a man cannot be convicted of an offence, unless he infringes some known law ; but they did not point out what they meant by some known law, whether constitutional or statute law, or law founded in decided cases applying, or the law of reason &c. where one's actions may be adjudged to be offences or misconduct, or misbehaviour, or bad behaviour in opposition to good behaviour in office, though against no constitution, statute, or adjudged case ; but actions of a new description never before put on trial, yet so clearly in violation of the law of reason as to be beyond all doubt misbehaviour in office, as the case of the President's so keeping laws cited above, a case that may happen, though it never has as yet happened. Much time was spent, if not wasted, on both sides in the arguments for the want of a better definition of what was intended by some known law. Many judges and others in the United States hold their offices during good behaviour, or so long as they behave or conduct well in their offices.

Must it to be impeachable, be an offence against some known law.



**Сн. 222.** Now what is good behaviour in office is certainly a very general and indefinite question, not defined by a statute, constitution, or adjudged cases, nor can it be in the nature of things; but what is good behaviour or not in office must ever essentially depend on the actions of the officer, and circumstances of the particular case, too numerous and various to be reduced within any known law in the proper sense of the expression. Opposite to good behaviour, is bad behaviour, misconduct, misbehaviour, or mal-administration in office, equally uncertain and indefinite in the nature of things, as good behaviour, and as incapable of being defined by any statute or adjudged cases; because this misbehaviour may be so infinitely various even in a single case. A judge, for instance, where there is no statute forbidding him to advise either party in a suit before him, does however, directly or indirectly, in a greater or less degree, by words, or hints, or actions, advise one party in the opinion of some, now what judicial decision can be made, or law enacted, that can possibly serve as a rule in all cases of the one description. The question of fact, does he advise one party or not, may be extremely doubtful in hundreds of instances. And if proved he does advise one party, yet this advice may be so very trifling &c. as to leave a question, if impeachable or not; and though impeachable in some cases, yet clearly it may not be indictable, and not in violation of some known law in the proper sense of the expression. Or the misbehaviour may not be indictable, and yet against some known law. As where the officer takes more fees than the law allows, and that gives an action of debt only for his taking such fees; here he violates a known law, yet is not indictable.

Plea to the first article of impeachment &c.

To the first article of impeachment the plea was: "And the said Samuel Chase for plea to the said first article of impeachment saith, that he is not guilty of any high crime or misdemeanor, as in and by the said first article is alleged; and this he prays may be inquired of by this honorable court, in such manner as law and justice shall seem to them to require."—Just such a plea Judge Chase pleaded to each of the said eight articles in the impeachment against him. On this first article votes of the Senators were 16 guilty, 18 not guilty.

Art. 2d of the impeachment. Callender's case, as to Basset.

This article charged as above, that the respondent with intent to oppress Callender, and procure his conviction, improperly kept John Basset on the jury &c. In answer to this article Judge Chase admitted he held the court at Richmond in May, 1800; but in his defence cited the sedition act passed May 4, 1798, which enacted, "that if any person shall write, print, utter, or publish, or shall knowingly and wittingly assist and aid in writing, printing, uttering, and

Art. 10.

publishing any false, scandalous and malicious writing or writings, against the President of the United States, with intent to defame, or to bring him into contempt or disrepute, such person being so thereof convicted, shall be punished by a fine" not exceeding \$2000, and be imprisoned not above two years; and the accused may give the truth and the special matter in evidence, "and the jury shall have the right to determine the law and the fact under the direction of the court as in other cases." He also stated, the indictment for a seditious libel found against Callender, alleging that he "being a person of a wicked, depraved, evil disposed, disquiet, and turbulent mind and disposition, and falsely and maliciously designing and intending to defame the President of the United States, and to bring him into contempt and disrepute, and to excite the hatred of the good people of the United States against him, on the first day of February," 1800, "and of the independence, &c. in the Virginia district aforesaid, and within the jurisdiction of this honourable court, did wickedly and maliciously write, print, utter, and publish a false, scandalous and malicious writing against the said President of the United States, of the tenor and effect following, that is to say," "The reign of Mr. Adams, (meaning John Adams Esq., President of the United States) has been one continued tempest of malignant passions; as president, he (meaning the said President of the United States) has never opened his (meaning the said President of the United States) lips, or lifted his (the said president meaning) pen, without threatening and scolding. The grand object of his (meaning the said President of the United States) administration has been to exasperate the rage of contending parties, to calumniate and destroy every man who differed from his opinions. Mr. Adams (meaning the President of the United States) has laboured and with melancholy success to break up the bonds of social affection, and under the ruins of confidence and friendship, to extinguish the only gleam of happiness that glimmers through the dark and despicable farce of life." And also, the following false, scandalous, and malicious words, that is to say, "The contriver of this peace had been suddenly converted, as he said, to the presidential (meaning the said President of the United States) system, that is, to a French war, an American navy, a large standing army, an additional load of taxes, and all the other symptoms and consequences of debt and despotism." And after these two sets of words this indictment contained in like manner eighteen other sets of words, extracted from a book Callender wrote, called *The Prospect before Us*, some of which will be noticed as questions arise as to them.

CH. 222.  
Art. 9.

Indictment  
against Cal-  
lender on the  
Sedition act.

Decided, 7  
Cranch, 32,  
the United  
States courts  
have no com-  
mon law ju-  
risdiction as  
to libels  
against the  
United States  
government.

§ 2. To this indictment Callender pleaded not guilty, his

CH. 222.  
Art. 9.

Basset's case,  
the juror.

counsel, Messrs. Nicholas, Hays, and Wirt; judges, said Chase and Cyrus Griffin, district judge of Virginia district. The jurors were called, and severally asked on oath, "whether they had formed and delivered any opinion respecting the subject matter then to be tried, or concerning the charges contained in the indictment." They answered in the negative. And when sworn in chief to try the issue, John Basset, one of jurors, after answering in the negative, as above, expressed his wish to be excused from serving on the trial, because he had made up his mind, or had formed his opinion, "that the publication called *The Prospect before Us*," from which the words charged in the indictment as libellous were said to be extracted, but which he had never seen, according to the representation of it which he had received, was within the sedition law; but the court directed him to be sworn in chief on the jury. This conduct in Judge Chase gave rise to the second article in the impeachment. To this he answered, that Judge Griffin concurred in this act, and that the opinion that Basset ought to serve was legal and correct, and denied he acted under the influence of any "spirit of persecution and injustice," or with any "intent to oppress and procure the conviction of the prisoner." He urged that the Senate could not inquire into the correctness of this opinion any further than to find with what motives he delivered it, as it could not be a question before the Senate, whether this opinion was right or not, if he delivered it honestly. He then stated his reasons, however, for keeping Basset on the petit jury,—as, that jurors ought not to be allowed to avail themselves of light excuses &c.,—as, that the true criterion is, "that the juror stands indifferent between the government and persons accused as to the matter in issue on the indictment." He contended that this indifference is always to be presumed, unless the contrary appear, and this may be shewn by the juror, or by the prisoner by way of challenge, or in other ways. But to shew a juror is not indifferent between the accuser and accused "as to the matter in issue," "it is not sufficient to prove that he has expressed a general opinion, that such an offence as that charged by the indictment ought to be punished;" "or that the party accused, if guilty of the offence charged against him, ought to be punished;" "or that a book, for the printing and publishing of which the party is indicted, comes within the law on which the indictment is founded." "All these are general expressions of opinion as to the criminality of an act of which the party is accused, and of which he may be guilty, not declarations of an opinion that he actually is guilty of the offence with which he stands charged." "It is impossible for any man in society to avoid having, and extremely difficult

for him to avoid expressing an opinion as to the criminality or innocence of those acts, which for the most part are the subjects of indictments for offences of a public nature; such as treason, sedition, and libels against the government. Such acts always engage public attention and become the subject of public conversation; and if to have formed or expressed an opinion, as to the general nature of those acts were a sufficient ground of challenge to a juror when alleged against him, or excuse from serving when alleged by himself, it would be in the power of almost every offender to prevent a jury from being impannelled to try him, and of almost every man to exempt himself from the unpleasant task of serving on such juries." The greater the offence the more these general opinions and expressions will exist. This reasoning peculiarly applies to the present case. *The Prospect before Us* excited general disgust &c. Hence almost every man fit to serve on a jury had formed this general opinion. Basset had expressed no opinion; he had formed none as to the book; "he had never seen *The Prospect before Us*;" he had formed no opinion as to Callender's guilt or innocence, "which depended on four facts wholly distinct from the opinion which he had formed: 1. Whether the contents of the book were such as had been represented to him (Basset:) 2. Whether they should on the trial be proved to be true: 3. Whether the party accused was really the author or publisher of the book: and 4. Whether he wrote or published it with intent to defame the president, or to bring him into contempt or disrepute, or to excite against him the hatred of the good people of the United States." "On all these questions the mind of the juror was perfectly at large, notwithstanding the opinion he had formed;" and on these the issue depended. Hence, Basset was indifferent as to "the matter in issue in the legal and proper sense, and in the only sense in which such indifference can ever exist." Basset on oath said he had formed no opinion.

ART. 11. *As to the matter in issue.*

§ 1. The respondent urged that these reasons were valid, but if not, and the decision incorrect, can the reasons, he asked, "be considered as so clearly and flagrantly incorrect, as to justify a conclusion that they were adopted by this respondent through improper motives?" "Are not these reasons sufficiently strong, or sufficiently plausible, to justify a candid and liberal mind in believing, that a judge might honestly have regarded them as valid?" And it seems the majority of the senate thought so, as twenty-four held he was not guilty of this second charge, and ten only of the members thought him guilty.

CH. 222.

Art. 11.

Third article  
of impeach-  
ment, Tay-  
lor's case, as  
to admission  
of evidence,  
art. 11.

§ 2. This third article relates to the rejection of Colonel John Taylor as a witness, with intent to oppress Callender &c. To this, Judge Chase answered in a way that involved some very nice questions of law as to the admission or rejection of testimony. He said the indictment against Callender consisted of two distinct counts, "each of which contained twenty distinct and independent charges, or sets of words. Each of those sets of words were charged as a libel against John Adams, as President of the United States; and the twelfth charge embraced the following words," "He, (meaning President Adams,) was a professed aristocrat; he proved faithful and serviceable to the British interest." "The defence set up was confined to this charge; and was rested upon the truth of the words." "To the other nineteen charges no defence was attempted or spoken of, except such as might arise from the supposed unconstitutionality of the sedition law;" which, if solid, applied to the twelfth charge, as well as to the other nineteen. Taylor was offered to prove this twelfth charge. Callender must have been convicted, unless he made a good defence against every charge; and if acquitted on the twelfth charge, he must have been convicted on the other nineteen, if the act was constitutional, "against which no defence was offered." The words in this twelfth charge constitute "one entire offence," "one entire charge," to "be taken together, in order to explain and support each other." "No words are indictable as libellous, except such as expressly or by plain implication, charge the person against whom they are published, with some offence, either legal or moral." "To be an aristocrat, is not in itself an offence, either legal or moral, even if it were a charge susceptible of proof; neither was it an offence, legal or moral, for Mr. Adams to be faithful and serviceable to the British interest, unless he thereby betrayed or endangered the interest of his own country; which does not necessarily follow, and is not directly alleged in the publication. These two phrases, therefore, taken separately, charge Mr. Adams with no offence of any kind," "and consequently could not be indictable as libellous; but taken together, they convey the implication that Mr. Adams, being an aristocrat, that is, an enemy to the republican government of his own country, had subserved the British interest against the interest of his own country; which would, in his situation, have been an offence, both legal and moral; to charge him with it was therefore libellous." [This is a very obscure inference.] Admitting, therefore, said Judge Chase, "these two phrases to constitute one distinct charge, and one entire offence, this respondent considers it, and states it to be laid, that no justification, which went to part only of the offence, could be

CH. 222.

Art. 11.

received. The plea of justification must always answer the whole charge, or it is bad on demurrer; for this plain reason, that the object of the plea is to shew the party's innocence; and he cannot be innocent, if the accusation against him be supported in part. Where the matter of defence may be given in evidence, without being formally pleaded; the same rules prevail. The defence must be of the same nature, and equally complete in one case as in the other. The only difference is in the manner of bringing it forward. Evidence, therefore, which goes only to justify the charge in part, cannot be received. It is not indeed necessary that the whole of the evidence should be given by one witness; the justification may consist of several facts, some of which may be proved by one person, and some by another; but proof in such cases must be offered as to the whole, or it cannot be received." "In this case under consideration, no proof was offered as to the whole matter contained in the twelfth article. No witness, except the above mentioned John Taylor, was produced or mentioned. When a witness is offered to the court and jury, it is the right and duty of the court to require a statement of the matters intended to be proved by him. This is the invariable practice of our courts." "From the statement by the traverser's counsel of what they expected to prove by the said witness, it appeared that his testimony could have no possible application to any part of the indictment, except the twelfth charge above mentioned, and but a very weak and imperfect application even to that part." The court therefore requested the questions to be put in writing &c. All this reasoning is perhaps correct, with two exceptions. First, said practice. It is conceived the practice in England, and in the United States generally, is for the party to state generally what, and all he expects to prove, before he adduces his evidence, but not what he expects to prove by each witness; but the court will suppose the party's counsel understands his case, and that the testimony of each witness, and the evidence of each paper &c. will be a part of the general evidence, so stated in stating what he expects to prove; and if any improper evidence is then adduced, the court will reject it; but never if *pertinent* to the cause in trial, though variant from what was so generally stated; for surely if a party's counsel were thus generally to state his evidence, and that not sufficient fully to support his cause or defence, but should produce in the trial evidence fully sufficient to support it, the court would admit the evidence produced: 2. There was a fallacy in this part of the defence not readily seen. Suppose the party bound by rules of practice to state what he expects to prove by a witness he produces before

CH. 222.

Art. 11.

Questions to  
Taylor re-  
jected.

he examines him, most clearly he is not bound to state particularly thus early, what he expects to prove by each of ten, twenty, or fifty other witnesses he may produce after the one offered for immediate examination; or may not produce, as his cause in its progress may or may not require. Yet this part of Judge Chase's defence clearly implied he had a right to reject Taylor's testimony, going to prove but part of the twelfth charge, because the managers, when they called him, did not state evidence enough to come after his to prove the rest of it, and so evidence to prove the whole of it. Nor do I see the need of this part of the defence, for when the questions proposed to be asked Taylor were understood, and put in writing, a thing proper enough when doubt exists, or the first decision on it may be revised in a higher court, it was very clear the questions themselves were exceptionable without reference to any other evidence. The first question was, "Did you hear Mr. Adams express any sentiments favourable to monarchy or aristocracy, and what were they?" For it is impossible to see how this question had any tendency to prove the said twelfth charge was a libel upon the President of the United States, or not; also to admit questions so extremely vague and indefinite in judicial trials, in which there ought always to be precision and certainty, would be to spin them out to insufferable length. The second question was, "Did you ever hear Mr. Adams, while Vice President, express his disapprobation of the funding system?" This was equally exceptionable as the first question, for what possible relation could his disapprobation of this system have to the said twelfth charge? Suppose Mr. Adams, many years before Callender wrote his book, disapproved the funding system, what possible tendency could this have to prove he was an aristocrat, and favoured the British interest; especially as the American, and every kind of government almost, had adopted funding systems. And if he disapproved the funding system when Vice President, and it was in the progress of adoption, he might very consistently support it after it had become law, and was established. But if inconsistent, what had such inconsistency to do with proving the twelfth charge true; that is, when President, he was an aristocrat, and favourable to the British interest.

The third question was, "Do you know whether Mr. Adams did not, in the year 1794, vote against the sequestration of British debts, and also against the bill for suspending intercourse with Great Britain?" This question was certainly as exceptionable as either of the others. For suppose Mr. Adams did vote against both, what possible tendency could this have to prove the truth of Callender's charge, that the President was an aristocrat, and favourable to the British in-

terest, in a sense to be criminal. He had no vote against these two measures but where the senate was equally divided ; measures since indirectly acknowledged to be foolish, even by many of those who advocated them at former periods. And further, these votes were not to be proved by parol testimony. Upon this third article in the impeachment, the votes of the senators were eighteen guilty, and sixteen not guilty.

CH. 222.

Art. 12.

ART. 12. The fourth article in the impeachment alleged Judge Chase, during Callender's trial, manifested partiality and intemperance in the five particular instances stated. First instance in compelling Callender's counsel to reduce to writing questions to a witness : 2. Refusing a continuance : 3. Rude expressions &c. to his counsel : 4. Vexatiously interrupting them : and 5. In his indecent solicitude to convict him. On this article the votes were the same as on the third article, eighteen guilty, and sixteen not guilty. It will be observed, that all the five instances or sub-charges were embraced in this one vote, and therefore eighteen members might vote against the respondent, some on one sub-charge and some on another, and yet not eighteen have been against him on any one ; we are not therefore so much surprised at this vote, as we are at the loose and vague character of these five charges, and the loose and vague laws cited in opposition to them. These deserve some attention, as they affect other and numerous cases as well as this. 1. Putting the questions in writing. As the court always has a right to reject or admit a question proposed to a witness, it follows of course the court has a right to deliberate upon it, and even to adjourn for the purpose, and fully to understand it, and often how is this to be done unless the questions be in writing ? And in most cases if the inferior court, as this was, decides erroneously, their decision is revised by a higher court ; how is this ever to be done properly, unless the questions be in writing ? And it is not recollected that it is found in any book, that this right has been denied ; it is true it may be abused by a vexatious use of it, but this does not appear to be this case. 2. The respondent refused a continuance, but offered a delay of six weeks. This continuance was claimed on an affidavit, which merits very special attention. The trial of an offender the same term an indictment is found, may be of course. The affidavit filed in this case by Callender to get a continuance on account of absent witnesses and books, was clearly defective ; as it did not state that he had not been able to have them in time for the trial, or that they could be had for the next term ; and as it stated no particulars as to books, he wished to obtain, where they were, or what they contained, or how they would apply to the case ; hence the affidavit did not furnish

Fourth article of the impeachment, several matters.



CH. 222. the proper facts on which the court could judge, if there  
 Art. 13. ought to be a continuance or not. And it was evident the  
 witnesses Callender named, as he stated their testimony, could  
 not prove any of his charges against Mr. Adams, contained  
 in *The Prospect before Us*, and in the indictment against him.  
 William Gardner and Tench Coxe were to prove Mr. Adams  
 turned them out of office for their political opinions or con-  
 duct. Judge Bee was to prove Mr. Adams, in 1799, advised  
 the delivery of Jonathan Robbins to the British Consul.  
 Timothy Pickering was to prove Mr. Adams did not imme-  
 diately send some foreign despatches to Congress. William  
 B. Giles and Stephen T. Mason were to prove that Mr.  
 Adams had, in their hearing, uttered some opinions favourable  
 to aristocracy and monarchy; and General Blackburn to prove  
 that Mr. Adams avowed, "there was a party in Virginia that  
 ought to be humbled in dust and ashes," before an indignant  
 people. Other parts of the fourth article cannot be noticed  
 here,—rude conduct to counsel, vexatious interruptions of  
 them, and solicitude to convict.

Fifth article  
 of the im-  
 peachment,  
*capias*, and  
 not *summons*.

ART. 13. *The fifth article in the impeachment.* § 1. The  
 judge issued a *capias* to arrest Callender instead of a *summons*.  
 And it is said by the laws of Virginia the process ought to  
 have been a *summons* and not a *capias*; and that the court  
 was bound to issue it by the laws of Virginia. This is a  
 material matter, as it respects the Federal process generally,  
 and ought to be considered.

Act of Con-  
 gress, Sept.  
 24, 1789.

§ 2. By this act, to establish the judicial courts of the  
 United States, sect. 33, it is enacted, "that for any crime or  
 offence against the United States, the offender may be arrest-  
 ed, imprisoned, or bailed, agreeably to the usual mode of  
 process in the State, where such offender may be found."

§ 3. And the law of Virginia provided, "that upon present-  
 ment by any grand jury of an offence not capital, the court shall  
 order the clerk to issue a summons against the person or persons  
 so offending, to appear and answer such presentment at the next  
 court." It was urged by the managers, that the said act of Con-  
 gress made this Virginia statute the rule of proceeding, and that  
 this State law was violated by issuing a *capias* against Callen-  
 der, instead of a *summons*. The date of this law was not  
 mentioned in the impeachment. And it was said by Judge  
 Chase, that this was a material omission; for this act of Con-  
 gress could not be construed to respect State laws enacted after  
 that act was passed. This point, so important, has never been  
 settled. Though it may be reasonable to confine this act of  
 Congress to State laws in force when it was passed, yet this  
 construction is by no means a clear one. Suppose a State  
 law then in force, that regulated the process, which since has

been altered some, by an additional State act; or a State law then in force to such purpose, has since been repealed, and a new one passed, varying the form of process some, what is the effect? It is a question at least so doubtful, as to justify us in saying, it is best to leave the construction to future judicial decisions. On examination, it appeared this law of Virginia was passed November 13, 1792, above three years after this act of Congress was passed. But in citing the Virginia law it was said, strictly there was another more material oversight. Its title is, "an act directing the method of proceeding against free persons, charged with certain crimes &c." and enacts as above, but adds, or "*other proper process*;" these words, or *other proper process*, were omitted in the impeachment. Therefore Judge Chase contended that these words left "it perfectly in the discretion of the court what process shall issue, provided it be such as was proper for bringing the offender to answer to the presentment." Then if this Virginia law applied, he urged, it did not order a summons to be issued, but left the process in the discretion of the court,—and this seems clear. He further urged, that a *capias* was the proper process to be issued in all cases of high offences, though not capital, as after presentment made him, meaning indictment found, a summons would be only notice to the offender to make his escape; and some cases were cited in the practice of Virginia to justify this construction. And it seems difficult to find any other on the sound principles of law. But in the third place it was denied, and with reason, that this State law was the rule of process in this case, because by the same act of Congress of September 24, 1789, sect. 14, the courts of the United States have "power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law;" consequently the Circuit Court had power to issue a *capias* against Callender on the presentment, if this Virginia law did not govern the case, and restrain this Federal power; and the respondent contended it did not, and hence he decided this matter correctly. And it seems the Senate was of this opinion, as it acquitted him unanimously on this article; but on which of these grounds does not appear; it might on each and all of them.

CH. 222.  
Art. 14.



ART. 14. Sixth article of the impeachment was in fact the same as a part of the fourth;—was for a refusal to continue the cause, with an intent to oppress &c. This charge also is important, because it involves the construction of Federal and State law on the same subject.

Article 6th of the impeachment, trial first term.

By the 24th sect. of this act it is enacted, "that the laws

Act of Congress, Sept. 24, 1789.

CH. 222. of the several States, except where the constitution, treaties, or  
 Art. 14. statutes of the United States shall otherwise provide, shall be regarded as the rules of decisions in trials at common law in the courts of the United States, in cases where they apply." And a law of Virginia provided, "that in cases not capital, the offender shall not be held to answer any presentment of a grand jury, until the next term succeeding that during which such presentment shall have been made." It was urged by the managers that this Virginia law was made the rule of decision by said act of Congress, and was violated by bringing Callender to trial the term at which the presentment was made. In a legal view, the view in which this case is here mainly considered, the respondent contended, that not only no such Virginia law was known to him, or mentioned by Callender's counsel, or by Judge Griffin, always a lawyer and judge in that State, but also that no such Virginia law existed, though possibly it might be an inference made by the authors of the impeachment from the law of Virginia of November 15, 1792, mentioned in the preceding article, which is as above, and adding, to appear and answer the next term. Judge Chase denied this inference, because this act speaks only of presentments and not of indictments, which are very different things, and urged the practice was in Virginia to confine this act "to cases of small offences," to be tried by the court itself on presentment, without an indictment, or the intervention of a petit jury, and extended not to this case of Callender. And further, this act of Congress directs the State laws to be the rule of decision in the courts of the United States, only in cases where they apply. "Whether they apply or not to a particular case is a question of law, to be decided by the court where the case is pending;" and an error in making the decision is not an offence, unless proved to proceed from improper motives. Nor did this Virginia act apply to this case. Lastly, he contended that this act was not adopted by the said act of Congress, as the rule of decision in such cases as this. That act of Congress indeed does provide as above; "but this provision, in his opinion, can relate only to rights acquired under the State laws, which come in question on the trial, and not to forms of process or modes of proceeding, anterior or preparatory to the trial. And it was denied by the respondent that the word, *trial*, in said 24th section, included the process to bring in the offender. Nor can it, as this respondent apprehends, have any application to indictments for offences against the statutes of the United States, which cannot, with any propriety, be called trials at common law." It relates merely, in his opinion, to civil rights acquired under the State laws; which, by virtue of this pro-

State laws,  
 how a rule of  
 decision.

vision, are, when they come in question in the courts of the United States, to be governed by the laws under which they accrued." These questions are but a very few of that multitude of questions that must arise in practice upon the above provision in this act of Congress. Whether these opinions as to it given by the respondent are correct or not, it is difficult to say. One thing, however, is certain, that if we construe this provision to make State laws the rules of decision in the United States to the great extent some contend for, nothing but confusion will be the result. Certain it is also, that the provisions contained in the constitution, treaties, and statutes of the United States, ought to be liberally construed and extended: 1. Because they generally contain, or are founded on, the fundamental principles of the American system: 2. Because then constitutional, treaty and statute provisions, wherever applied, produce uniformity throughout the United States,—a matter always to be aimed at: 3. Because as these principles in general pervade the whole Union, and are the established principles of the whole nation, and as uniformity is very desirable, they ought to be extended wherever they can be, by a fair and liberal construction, and not contracted by a narrow and local policy: 4. Because these Federal provisions have been enacted by the ablest men of our country, especially for several years after the Federal Constitution was adopted, and they are clear, certain, and written law: 5. Because the State laws are numerous and various, and in general very uncertain. But little besides the State constitutions and statutes are written law; for the common law of each State is to be found in writing but in a small degree, though of vast extent, because it consists mainly in judicial decisions, and but a few of those decisions have ever been reported or published, none of them of any importance until within a few years. Therefore, often when a question arises in a Federal court, what is State law on any subject, we find the judges and lawyers of that State materially differing; therefore, those of Virginia we see disagreed as to what the laws of that State were in regard to the *capias* and continuance in this case. As Judge Chase was almost unanimously acquitted on this 6th art. (being only four votes against him,) it is pretty clearly to be inferred, that the senate deemed the ground he took, and the principles of construction he relied upon, good and valid. Or it is true, the majority might think he acted honestly, though he mistook the law.

ART. 15. *Seventh article in the impeachment*;—as to advising the grand jury &c. in Delaware to search for libels in a certain newspaper.—As to this, the votes in the Senate were, guilty, 10: not guilty, 24. This proves that a large majority of the

CH. 222.

Art. 15.

Impeachment, seventh article,

CH. 222. Senate was of opinion that there was no misbehaviour in office, in keeping the jury together and in advising them as is stated in this seventh article in the impeachment. For the facts, exclusive of the corrupt motives, were proved nearly as they were stated in the impeachment. Part of the defence was, that that newspaper, called the Mirror, was as seditious as he had represented it to be ; and, to prove the fact, produced a number of them on his trial.

*Eighth article in the impeachment.*

Impeachment, eighth article.

This merits attention, on account of its peculiar political character ; and because on this, 19 senators voted that Judge Chase was guilty, and 15 voted that he was not guilty. Since a majority, in fact, though not a *constitutional* majority of two thirds, thought him guilty. This article, as above, respected his conduct at Baltimore, in May, 1803, and charged him with electioneering practices &c. in his charge to the grand jury. To this he answered, that he held the Circuit Court as stated, charged the grand jury and expressed "some opinions, as to certain public measures, both of the government of Maryland, and that of the United States ;" but denied he perverted his official right, or that he "had any intention to excite the fears or resentment of any person whatever, against the government or constitution of the United States or of Maryland." For the truth of what he delivered he relied mainly on his written charge. The charge was thus : "You know, gentlemen, that our State and national institutions were framed to secure to every member of the society *equal* liberty and *equal* rights, but the late alteration of the Federal judiciary by the abolition of the office of the sixteen circuit judges, and the *recent* change in our state constitution by establishing *universal* suffrage, and the further alteration that is contemplated in our State judiciary (if adopted) will, in my judgment, take away *all security for property and personal liberty*. The independence of the national judiciary is already shaken to its foundation ; and the virtue of the people alone can restore it. The independence of the judges of this State will be entirely destroyed, if the bill for the abolishing the two supreme courts should be ratified by the next general assembly. The change of the State constitution, by allowing universal suffrage, will, in my opinion, certainly and rapidly destroy all protection of property, and all security to personal liberty ; and our republican constitution will sink into a *mobocracy*, the worst of all possible governments." "I can only lament that the *main pillar* of our State constitution has been thrown down by the establishment of *universal* suffrage. By this shock *alone* the whole building totters to its base, and will crumble into ruins before many years elapse, unless it be *restored* to its original

CH. 222.

Art. 16.



state. If the independency of your State judges, which your bill of rights wisely declares to be essential to the impartial administration of justice, and the great security to the rights and liberties of the people, shall be taken away, by the ratification of the bill passed for that purpose, it will hasten the destruction of your whole State constitution, and there will be nothing left in it worthy the care or support of freemen." Judge Chase denied that he made any other political charge than this. He contended that this was temperate and reasonable, and that it has been a general practice in the United States since the year 1776 for judges thus to make and deliver political charges, and that very generally they have been allowed and approved. If so, it is difficult to see on what ground a majority in fact of the senate condemned him on this article : but the case did not turn out in evidence, clearly, as Judge Chase stated it. There was some evidence that he severely censured the administration of the general government as weak and relaxed. One witness swore positively to this. Montgomery testified, that Judge Chase, in charging the grand jury, said the present administration was "inadequate to discharge their functions, and that their acts flowed not from a wish for the happiness of the people ; but for a continuance in unfairly acquired power." Though there were many other witnesses who testified negatively that they did not hear any of these matters so testified to by Montgomery. On the whole, it is somewhat uncertain on what ground the senate decided on this eighth article. Hence it is not certain they considered the political charge Judge Chase confessed as misbehaviour in office, or because his manner tended to stir up opposition to the then existing government, or because they believed Montgomery, and thought the judge went to culpable lengths in censuring the existing administration. But it may be observed, that both parties in their arguments condemned *political* charges.

ART. 16. *Several other points in this cause.*

Callender's counsel contended, that by a law of Virginia the *jury assessed the fine*, but the court said, this had no application to the courts of the United States, and clear it is that in those courts the *judges* have assessed the fines in criminal cases. This, it is conceived, is according to the rule in England and in the United States, where there is no statute especially to the contrary. And wherever a fine is to be not more than so much or less than so much, a very common thing, there is, of course, a *discretionary* power lodged somewhere by the law, to determine the exact fine to be inflicted. Often it is lodged in the *judges in express words*, and if not so in express words, yet this power is vested in the judge by a fair construction of

CH. 222. the law, whenever it does not name the judge or jury as the proper body to exercise this power. The fine, also, is, usually or often connected with imprisonment, binding to the peace and good behaviour, and sometimes gallows, whipping, &c.; and, in general, it would be absurd to vest in the jury power to regulate part of the punishment, and in the judges part. And in no instance, and in no State, it is believed, the jury ever had power to regulate these other parts of punishment. Such attempts to limit federal powers have ever been made by State politicians hostile to the general government, especially the federal administrations. In this case it seems to be generally understood, as the law of the land, that a *capias* is the proper process wherever the offence is punishable by imprisonment,—for a very obvious reason, because whenever the punishment is imprisonment, there ought to be issued a process to arrest and secure the body of the offender in order to imprison him if convicted, and a *capias* only, and not a *summons*, is to this purpose. And where the punishment is so, “a summons would be a notification to the offender to abscond or remove himself out of the reach of the court.”

ART. 17. *Challenges of Jurors.*

It was held by the judges, Chase and Griffin, that there can be no challenge to the *array*, because a juror on the pannel has expressed an opinion unfavourable to one party. But it is only cause of challenge to the particular juror and for favour. It was much argued by the respondent and his counsel that a juror cannot be challenged for having *formed* an opinion in a case; but only, for having *delivered* an opinion; because, said they, till the opinion be *delivered*, no one can know it is *formed*, and so there can be no challenge.—There seems to have been something light and trifling in this sort of reasoning; for it seems very properly to admit that merely *forming* an opinion was cause of challenge, if the fact be known that it was *formed*. But the challenge may be evaded as long as the *formed opinion is concealed*, however considerable the evil and partiality. But some wise legislatures, as that of Massachusetts, &c. have anticipated this evil of a *formed opinion* by a juror, but not disclosed, and, therefore, have wisely made provision for the disclosure of it whenever formed, and hence have made statute provision for the court's asking the juror himself the question, whether he has *formed an opinion*, and thus a wise provision obliges a juror, if he has formed an opinion, to declare it, and then he is set aside. It was also argued, and reasonably, that if a juror has formed an opinion, or formed and delivered or declared one, he is not to be challenged, unless it be formed from *motives of partiality*, that is, from favour or ill will to the one or other party. 2 Haw. c. 43, s.

28, who says, "it hath been allowed a good cause of challenge on the part of the prisoner, that the juror hath declared his opinion beforehand, that the party is guilty, or will be hanged, or the like. Yet it hath been adjudged that if it shall appear the juror made such declaration from his *knowledge* of the cause, and not out of any *ill will* to the party, it is no cause of challenge." And sec. 29, "it hath been adjudged to be no cause of *challenge*, that the juror had found other persons guilty on the same indictment; for the indictment is, in judgment of law, several against each deft. For every one must be convicted by particular evidence against himself." So vol. 2, State Trials, also, shews, that though a person is a witness in a cause, it is no reason he should not serve as a juror; and, also, that the knowledge which a juror may have of a cause to be tried by him, is no disqualification. So judges may be witnesses, and yet sit in the cause and decide.

CH. 222.  
Art. 18.


Another ground as to jurors and challenges was taken in this cause, namely, that a juror cannot be examined on oath in a criminal case to prove he made a declaration which would be a good cause to challenge him for favour, as it implies something criminal thus to make such declaration. 2 Hawkins, 589, Leach's edition, in a note it is said, "that the prisoner shall not examine a juror concerning such matter on a *voir dire*, because it sounds in reproach." 1 Salk. 15, Cook's case; he being indicted for high treason, offered to ask the jurors when called, in order to challenge them, "if they had not said he was guilty or would be hanged." And by the court this is good cause of challenge, but then the prisoner must prove it by witnesses, not out of the mouth of the juror.

#### ART. 18. *Constitutionality of a statute.*

It was a strong ground well taken in this case by the respondent and his counsel; that though the jury in criminal cases is to judge of the law and the fact, that is, what an existing law means, yet the jury is not to judge and decide the constitutionality of a statute or law. This is not to decide its true construction, if the prisoner's case comes within it, but to decide whether what is produced as law is not void, a mere nullity, a dead letter; or in other words, whether such a law is in existence. This right, it was further said, was never contended for before the cases of Fries and Callender; but it has ever been allowed the exclusive right of the court to decide if a law exists or has been enacted, or repealed or become obsolete, or is in force. "The very right claimed on behalf of jurors, that they may determine what is the true construction of the law, and whether the case is within its provisions, of itself necessarily presupposes, and is predicated



CH. 222. upon the existence of a law, the true construction or meaning  
 Art. 18. of which they are to determine."

 *The power of the jury to decide the law, the meaning.* In the cases of Fries and Callender, it is certain very novel ground was taken as to the power of the jury to decide what is law, as well as what law is constitutional, to which it was well answered by the court, and also held by Judge Chase and his counsel; that is, that the jury is to decide the law as well as the fact in criminal cases properly understood. It is unquestionably a general maxim that the judges are to answer to the questions of law and the jury to questions of fact, and if this were not the case, it is inconceivable why so much pains have been always taken in all well governed countries to have judges learned in the law, and jurors from the body of the people, however in general uninstructed in the science of the law. The truth is, a jury is not to decide if a law is constitutional or if it exists, these matters the judges decide. Nor is the jury to decide what is law or not, or what is by law, this or that crime, but only if the case they try comes within a law, held by the judges to exist. It is the right and duty of the jury to apply the law to each particular case, (the law pointed out by the judges) and to decide if the facts proved in any cases bring it within the general rule of law; and this is the only right of the jury,—they cannot dispense with or disregard any law of the land held by the judges to be such. If, for instance, it be proved one breaks and enters a dwelling-house in the night time, with intent to steal, the judges pronounce that by law this is burglary, and so is the law, and no jury whatever has any right or power to decide, this is not burglary, or that the law of the land does not make it burglary. But the jury may decide that the house was not broken open, or was not entered, or that it was not night-time, or that it was not a dwelling-house, or that the accused did not enter with intent to steal or commit a felony; or that the accused is not the person who committed the offence. But if the jury believe the affirmative on all the points, they are bound to find the accused guilty of burglary, and they are bound by the law as laid down by the court. Their sole duty is to apply the law declared by the judges to the particular case; and in this sense the jury are judges of the law, as well as the fact. If the jury has ever had power to decide what is, or is not law, that such a law exists or does not, why have special verdicts always been so repeatedly found by juries in order that the court, and not the jury, may pronounce the law. Thousands of cases are found in the English and our books of special verdicts found by juries, in order that the judges, and not the jury, may decide if by law the case so found is

murder or manslaughter, treason or riot, burglary or mere house-breaking, felony or a less offence ; that is, that the judges may declare what the law is, or what the offence is by law in each case. CH. 222.  
Art. 19.

ART. 19. So if juries have ever had the extensive powers contended for by some to decide what is law, and what the law is, on what ground have jurors been so often attainted for finding verdicts against law ? And why in modern times are new trials so often granted where the jury convict the accused against law ? If the jurors are exclusive judges of the law, if constitutional, what is law, and what the law is, and if such a law or laws exist, on what principles can the judge say the jury has decided against law ? The power of the jury in criminal cases is further to be attended to. It is true, in their general verdict on the general issue of not guilty, they decide the law as well as the fact ; but how is this done ? They find a general verdict of not guilty, and involve the law in it with the fact, and so they decide the law, because it is a rule of law, an ancient maxim of many centuries standing, that such a verdict cannot be disturbed, though against law in the opinion of the judges. And the jury thus conclusively decide the law, but because of this maxim ; for if the jury convicts the accused in their general verdict on such issue against law, in the opinion of the judges, the verdict is not conclusive, but the judges may say it is against law, and set it aside and grant a new trial. But if the judges hold a particular law exists and such is its meaning, it is rather a question of fact to be decided by the jury, if the facts in the case bring it within that law. The managers in this case did contend that the jury has a right to decide on the constitutionality of an act of Congress ; so some lawyers of high standing have contended for this right, especially in some heated party times. As the judges by law decide what facts constitute burglary, murder, or riot, arson or not, so they must by law decide what facts constitute treason or other crime defined in law. It was asked in this trial by one of the managers, What, shall the judges "declare that a mere riot" is "a levying of war ?" Such a question makes us pause a moment, and but a moment, for in a moment's reflection we perceive the question is, if certain acts done constitute a levying of war, and so treason, as certain acts done constitute murder, burglary, or arson. We see also, the question in each case is a question of law, for as the law defines each offence, it must ever be a question of law what acts done amount to the offence so defined ; if murder, what acts done constitute murder within the meaning of the law which defines and punishes murder. We also in a moment perceive that somebody must necessarily decide the question ;

Judges decide what the law is, what is murder, &c.

Ch. 222. It must in every instance be decided before the offender can be punished properly. A number of armed men get together, and by force or violence prevent the execution of a public law, as in Fries' and other cases. Fries alleges it is only a riot; the government alleges it is a levying of war, and so treason; and which, is the question that must necessarily be decided by the judges or the jury; and the question gets to be which, the judges or the jury. In deciding this question, we naturally first turn to our law books, in order to find what the law of the land is in the case; we find, time out of mind, the question has been invariably decided by the judges, referred to them by the jury, in almost every special verdict, in every case in which the question has ever come to be a distinct question to be treated of and decided as a law question, and never decided by the jury except when it has been mixed and confounded with the facts of the case, all involved and blended together in the general issue. When did ever a jury take this question of law naked and by itself, and decide it? But has not this question in every case been referred to the court, when thus naked by itself it has been to be decided. Again, suppose the question one *de novo* and without precedent, but merely to be decided on principle, who ought to be entrusted with the decision of this law question;—the judges who are appointed usually, because they had law educations and spent their lives in studying such questions, and in collecting the learning and wisdom of ages in relation to them and other questions of law; or juries, usually taken from the body of the people, without any law educations, and who usually have not time or opportunity to consider, one time in fifty, a law question at all, until it is started in the very trial in which it must be decided,—men, many of whom never own a law book or read one? Nor is there any thing unequal in this; for this ground here taken allows just such controlling power to the jury as to questions of fact, as is here claimed for the judges as to questions of law. Again, the true distinction seems to be admitted on all hands in civil causes, that is, that it is the true province of the judges to answer to questions of law, and of the jury to questions of fact. Why in civil causes is not law knowledge acquired by study and practice, as essential in criminal as in civil causes? Where is there a law question in civil causes that requires more accurate law knowledge in order to decide it properly, than the law question in criminal causes, What is murder, what manslaughter? And we find it, time out of mind, has been the practice of juries, courts, and parties, when the jury has found itself not satisfactorily instructed by the judges as to the question of

law, what is murder, or what manslaughter, to refer this question on which life itself usually depends, to the judges in the form of a special verdict; many instances of which have been already stated in this work, and hundreds of instances of which may be found in our law books, English and American. The confusion and different opinions on this subject have no doubt arisen in a great degree from the difficulty there has always been in drawing a clear distinct line between questions of law and questions of fact.

CH. 222.  
Art. 20.




ART. 20. *Seditious charge.* It seemed to be admitted in this case by Judge Chase &c. "that for a judge to utter seditious sentiments, with intent to excite sedition, would be an impeachable offence; although such a doctrine would be liable to the most dangerous abuses, and is hostile to the fundamental principles of our constitution, and to the best established maxims of our criminal jurisprudence;" but if correct, the seditious intention must be clearly proved, "either from the most necessary implication from the words themselves, or by some overt acts of a seditious nature connected with them." But no such acts were charged in this case, but the proof of such seditious intent rested on the words themselves. The question then was, did these words in themselves prove a seditious intention. Judge Chase cited certain written words, as above, and alleged that he uttered no others. These could not in themselves prove such seditious intent. But on the whole evidence, it remained a doubt what words he did utter. Words, as uttered by him, were alleged in the 8th article different from those he admitted he uttered, and the nineteen senators who voted on this article he was guilty, might vote so because they thought these other and different words were proved by the testimony of Montgomery. Judge Chase contended that, "as a freeman, he had a right to advance" political sentiments. This was undoubtedly true, that he, as a freeman, might do this, as every other freeman may; but it will be observed, that when a freeman, a mere freeman, an individual, delivers a political address, he exercises his individual right, and that only, and just so good a right as he has politically to address those present, each of them has to answer him on the spot. A judge no doubt may adjourn his court, and then as an individual or as a freeman, may make his political address, and each thus will have a right to answer him, and make political addresses too, and there can be no contempt of court, as it is adjourned, and not sitting; and after the court is adjourned, it is not material whether he makes his address from the bench, the bar, the jury seats, or other place for doing it, as a freeman or individual, he is on a level with others;—and this is exactly as it should be. But

CH. 222. there has long been a fallacy in judges delivering political charges from the bench, and ministers from the pulpit &c.  
 Art. 21. that has deceived almost every one. Each judge or minister claims the right as a freeman, as judge Chase did in this case; and the deception is in this—he claims the right *individually*, but exercises it *officially*; and into this very deception judge Chase fell in this case, and also without seeming to see it; for so far is such an address delivered according to the right claimed, that is, individually, and as by a mere freeman, it is delivered by one in the seat or place of office, sitting his court, when it is almost universally understood it is a contempt of court, and punishable, to answer even in a way that it would be proper to answer an individual. So as to the minister, he delivers his political address during divine service, while the public worship exists; hence as almost universally understood, it would be an interruption of public worship, and a punishable offence, any way to answer him, or check him at the time. Thus by claiming an individual's or a mere freeman's right, and his thus exercising it officially or under the protection of his judicial or sacred office, that makes him the only speaker, and effectually silences all others present, he steals an advantage over all others assembled with him by sophistry and artifice. In this trial, (as on many occasions,) all parties, counsel, and witnesses, seemed to agree that a political charge from the bench is no part of a judge's official duty; and if he spends a considerable portion of his time in forming and delivering political addresses, to the neglect of his official duties, he is not only censurable for thus abusing his office for his political purposes, but justly forfeits a portion of his salary. The same remarks apply to political addresses from the pulpit.

Mass. Senate,  
 1821, Pres-  
 cott's case.

ART. 21. *A judge of probate impeached and removed from office for malconduct in it.* He was impeached by the House of Representatives before the Senate, and many articles of charge were exhibited against him; but on two of which only was he convicted by a constitutional majority of two-thirds or the senators present, to wit: the third and twelfth. The third was in the following words:—"That said James Prescott, Esq. judge as aforesaid, on the second day of August, A. D. 1819, at his said office, in Groton aforesaid, and not at any Probate Court held according to law, did decree and grant letters of administration upon the estate of one Eri Rogers, to one Benjamin Dix, Esq., and thereupon did issue a warrant to appraise said estate; and the said Prescott did, then and there, wilfully and corruptly, demand and receive of said administrator, as and for the fees of his said office, in the business aforesaid, other and greater fees than are by law

CH. 222.  
 Art. 21.



allowed therefor, to wit : the sum of five dollars and seventy cents. And that the said Prescott, on the nineteenth day of said August, at his said office in Groton aforesaid, and not at any Probate Court held according to law, did receive the said administrator's return of the inventory of said estate, and, then and there, did decree and grant a commission of insolvency upon the estate aforesaid ; and the said Prescott did, then and there, wilfully and corruptly receive from said Dix, other and greater fees than are by law allowed for the business aforesaid, to wit : the sum of thirty-nine dollars and two cents." These articles deserve attention, because they shew what is misconduct in the office of a judge of probate, for which he may be convicted and removed. It will be seen the charge against him in the third article, of misbehaviour and malconduct, was, that he, at his lawyer's office, and not at any Probate Court, did that probate business which he should have done only in a Probate Court, legally holden, and exacted and received corruptly more than legal fees. As to the place of doing the business, he might misunderstand the law, and on this ground, probably, and because the fees he received had been in practice received in some places, some of the senators, and among them respectable lawyers, voted to acquit him. And the charge against him in the twelfth article, a very long one of malconduct was, that he, in his Probate Court legally holden, corruptly demanded and received \$5 of a party in settling a guardianship account, under the pretence of counsel and advice, and did allow this sum to the guardian, and insert, by interlineation, said \$5 in said account, after the other party had left the court, in whose presence the account had been stated and sworn to ; and to induce the guardian to pay said \$5, and to admit said insertion, said Prescott told him the other party need know nothing about it. This other party was the overseers of the poor, the ward being a person *non compos mentis*, settled in their town. On this article, too, several several senators, and among them respectable lawyers, voted to acquit him,—probably because this advice and fee, though illegal, was not without precedents in practice, and because they might think the said overseers were not properly a party, it not being stated in this twelfth article that the said ward was chargeable, or like to be, to the town ; or for other reasons that do not occur to one who was not present at the trial.

Kentucky.—Proceedings in cases of impeachment in this state are regulated by a statute enacted December 17, 1792. T. K. Law, p. 59, 60.

## CHAPTER CCXXIII.

## TITLES UNDER STATUTES TO PROPERTY IN THE SEVERAL STATES IN THE UNION.

ART. 1. *General principles.*

§ 1. It will here be recollected that titles to the various kinds of property in Massachusetts and Maine, as well under their statutes as on the principles of the common law, have been already stated quite at large in various chapters in this work. Also that statute titles to estates in New York and other States, have been occasionally stated, as cases have occurred. It may be now useful to state titles to property under statutes very briefly, but in order, in the several States, Massachusetts and Maine excepted. Such a brief sketch of statute titles is not formed for the use of the practising lawyer in his own State,—only the original statutes can properly answer his purposes,—but to shew generally how uniform statute titles to estates, real and personal, are in substance, in all the numerous States that compose our Union, (Louisiana excepted,) though variations not material and in detail, may be extremely numerous. It is not the intention in this chapter to notice such titles at large, but generally as they existed about A. D. 1810, under statutes enacted in the respective States : and 1. Statutes respecting deeds and conveyances : 2. Statutes respecting last wills and testaments : and 3. Those respecting the descent, distributions, and settlements of estates, including the interests of guardians and wards.

§ 2. A stranger may question this uniformity, but a lawyer, who knows the history of our laws in the several colonies, provinces, territories, and states, in Federal America, will not ; but he traces the uniformity and sameness of titles, in substance and principle, as well under statutes, as at common law, in this manner. He recollects that most of our ancestors who settled Federal America, came from the same country, England, and brought with them not only the English common law, but also numerous English statutes, cited in prior chapters in this work, relating to titles, (among other things,) to the different kinds of property enjoyed in civilized societies, and best suited to their new situation. Some of these statutes we have seen, and shall see, were adopted and practised upon here as common law, and some of them re-enacted here in substance, into American statutes, by the colonial, provincial,

CH. 223.

Art. 1.

territorial, and State legislatures. Thus State statutes, in all the most material points of titles, as well as common law principles, being derived from the same source, the English laws, there naturally grew up in our Colonies and States, this sameness in titles to property above mentioned. Further, all our Colonies early adopted the English deed, in all its essential parts, and this acknowledged, or proved, and enrolled, or registered, became every where our deed acknowledged, or proved, and recorded, in the county or district in which the land conveyed by it lay. Thus the English deed, with inconsiderable modifications, became the great instrument in conveyances in all the English Colonies in America. So our ancestors adopted the different kinds of conveyances generally stated in a former chapter. The American lawyer likewise recollects that our American settlements, and so titles, began in Virginia and Massachusetts nearly on the same foundation, and so derived from the same fountain head, the English law books; and they differed but little, except as to the descent of real estates, a difference of late years done away nearly. Massachusetts and Virginia from the first became the two important points in the whole. The Northern Colonies, afterwards settled, adopted their laws and usages very much from Massachusetts; and the Southern ones from Virginia. The lawyer, therefore, who means to make himself master of American statute law, as to titles, (among other things,) will first make himself master of the laws of Virginia and of Massachusetts, as they are and have been; and in his well understanding these, he will understand the essential principles of all the rest, except those of Louisiana.

§ 3. It will be remembered, that besides Massachusetts and Virginia, fourteen of the present States were settled, and titles in them took root, before the territorial ordinance or constitution was established by Congress in July, 1787; under which all the other States in the Union, except Louisiana, have been settled, and titles to property, real and personal, in them, have grown up on uniform principles among themselves, and also in regard to the other States. This ordinance, (formed by the author of this work,) was framed mainly from the laws of Massachusetts, especially in regard to titles, and as to them, contains the following clauses, to wit: "The estates of both resident and non-resident proprietors, in the said territory, dying intestate, shall descend to, and be distributed among their children, and the descendants of a deceased child in equal parts; the descendants of a deceased child or grandchild to take the share of their deceased parent, in equal parts among them; and where there shall be no children or descendants, then in equal parts to the next of kin, in equal

See Ch. 187  
a. 6.



CH. 223.

Art. 1.



degree; and among collaterals, the children of a deceased brother or sister of the intestate, shall have in equal parts among them their deceased parent's share, and there shall in no case be a difference between kindred of the whole and half blood; saving in all cases to the widow of the intestate her third part of the real estate for life, and one third part of the personal estate." "And estates in the said territory may be devised or bequeathed by wills in writing, signed and sealed by him or her, in whom the estate may be, (being of full age,) and attested by three witnesses. And real estates may be conveyed by lease and release, or bargain and sale, signed, sealed, and delivered, by the person, being of full age, in whom the estate may be, and attested by two witnesses, provided such wills be duly proved, and such conveyances be acknowledged, or the execution thereof duly proved and recorded." "And personal property may be transferred by delivery." "And in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts or engagements, *bonâ fide*, and without fraud, previously formed." "There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted; provided always, that any person escaping into the same, from whom labour or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labour or service as aforesaid."

§ 4. Thus the laws of Massachusetts laid the foundation of titles to real and personal estates, by deed, by will, and by descent, in all the territories of the Union, northwest of the river Ohio;—and substantially in the other territories to which this ordinance has been extended. With regard to the laws of Massachusetts and Maine, it may be observed, that what is common law here, as sundry English statutes here adopted and before named, is statute law in many of the other States, as these English statutes in them have been, in substance, and sometimes *verbatim*, enacted into statutes in them; or *verbatim* adopted by Colony legislatures, declaring them in force.

§ 5. In this sketch of titles to property in the several States, a very great number of minor common-place provisions are not noticed; nor is it to be expected that all the provisions in the statutes of Massachusetts, on the subjects of this chapter, can be found in those of other States on the same subjects.

§ 6. In every country title to lands is acquired or lost by the *lex loci*, usually the statute law of the place. Hence a

writing made in Grenada, where the parties resided, and, according to the laws of that island, to pass land, would not give title to lands situated in Massachusetts. Change of sovereignty is no change of title. And in every State the remedy as to real property is according to the *lex loci*. 3 Wheaton's R. 212, 230, *Robinson v. Campbell & al.*

CH. 223.  
Art. 2.

ART. 2. *New Hampshire.*

Having in the former article noticed several general principles in relation to the subject of this chapter, attention will now be paid, but concisely, to statute titles in each State, (Massachusetts and Maine excepted, titles in those States having been already stated at large.) Maine was, till 1820, under the laws of Massachusetts, and has retained them, with very small alterations. New Hampshire was a long time formerly under them. On examining the statutes of this State, it will appear that they have been framed very generally on those of Massachusetts; the most material differences are, the following, on the subject of this chapter, to wit: 1st. The Judge of Probate may grant licenses to sell real estates of persons deceased, to pay debts and legacies, after giving due notice to all concerned, to make their objections, if they see fit.—(So by a late statute in Massachusetts.)

2d. The Judge of Probate may authorize a conveyance of lands, tenements, and hereditaments, when the testator or intestate in his life-time, in writing, contracted to convey them, and did not.

3d. After debts paid, the estates of deceased persons are expressly made liable to support the children, till they arrive to the age of seven years; and after that period, each child is supported, by express statute law, out of his or her own share.

4th. The statute law directs that the heirs' or distributees' bond to refund, if after debts &c. appear, shall be made to the Judge of Probate.

5th. That claims of creditors against the estate of persons deceased, shall be exhibited to his or her executors or administrators in two years, by the inhabitants of the State, and in three years by those creditors who live out of the State, or be barred forever.

Thus titles under statutes to property in New Hampshire, are to be understood to be, in substance, the same as in Massachusetts, with the above difference, though there are many variations in detail, not important. This concise mode has been adopted for two reasons: 1. To state these statute titles in the other States in the Union as fully as those in Massachusetts are stated in this work, would have required two thousand pages or more: 2. To all substantial pur-

CH. 223. poses, most of these statutes must have been repeated again  
 Art. 3. and again.



Further, many of the differences in statute titles in the several States, will be found to be temporary in their nature. Instance Kentucky—the perplexities there, the greatest in the Union, arise almost wholly from the loose way in which purchasers of wild lands were allowed to pick and choose and locate their lots, and from titles thereto being acquired by various grades. Whenever the first locations shall be ascertained, most of these perplexities will cease; they were foreseen, as the natural result of the Virginia plan in settling a new country, hence opposed month after month by the Eastern States, to prevent their passing the river Ohio; had this opposition been unsuccessful, the State of Ohio &c. would have been in the condition Kentucky is now in.

ART. 3. *Vermont.*

The statutes of this State as to such titles have been clearly drawn on the principles of those of Massachusetts, New Hampshire, and New York, and mainly the former. And the following statute provisions are found in Vermont not in the laws of Massachusetts, to wit: 1st. Estates for want of heirs &c. *escheat* to the towns in which &c. and not to the State; but the widow is made heir if there be no relations. The towns respectively are made accountable to heirs, devisees, or legatees, if they appear within seventeen years.

2d. Where a *feme covert* makes and executes a deed of her estate with her husband, she is examined privily, and apart from him in order that the court or magistrate taking her acknowledgment may be satisfied she acts freely, and without the coercion &c. of her husband.

3d. A female not married, eighteen years of age or more, is authorized to devise her estate or to convey it by deed.

4th. Male children in the estates of intestates have double portions, and the females single portions; but this provision is not extended to other relations.

5th. Executors and administrators are made accountable according to a new appraisement that may be made of the estates of the deceased by six appraisers, if not sold by order of the Probate Court.

6th. Bastard children born before the marriage of their parents are legitimised by their after marriage, and such children always inherit the mother's estate, or have a capacity so to inherit. [Law of Scotland.]

7th. As to the support of children of deceased persons, the same as number three in the next preceding article.

8th. Statute law provides for vesting the personal estates of minors in lands in certain cases, or to put the same out at

interest, as may be deemed for their interest. [See Massachusetts late act.]

CH. 223.  
Art. 5.

9th. Executors and administrators are made liable to an action of trespass for the trespasses of their testators or intestates, in taking &c. and carrying away goods and chattels. So they may have *clausum fregit* or ejectment &c. to recover lands to the use of the heirs or devisees.

10th. A creditor to an insolvent estate must call on the executor or administrator for his dividend in one year, or be barred.

#### ART. 4. *Rhode Island.*

In the statutes of this State are found the following provisions on the subject of this chapter, not in our laws, or rather our laws are materially different on the same subjects, to wit :

§ 1. Deeds in Rhode Island are recorded in town records, and in the office of town clerks.

§ 2. The wife, when she executes a deed of her estate with her husband, is examined privily, as in Vermont.

§ 3. A tenant in fee tail is empowered expressly by statute to devise by his will, or to convey by his deed, his estate tail in fee simple.

§ 4. Persons above eighteen years of age, not *femes covert*, may bequeath their personal estates.

§ 5. A statute authorizes town treasurers to take possession of the estates of persons dying without heirs, to be accountable for the rents and profits of them to their respective towns. And after the debts of the deceased owner are paid, the residue is paid to the towns respectively ; but an heir or heirs appearing in a limited time, he or they are entitled to the residue.

§ 6. If a person die after the first day of March and before the 31st day of December, his or her executors or administrators receive and account for the emblements on the deceased's estate ; but if after Dec. 31, and before the first of March, then they go to the heirs with the estate. See Maryland &c.

§ 7. If a tenant for life of an estate be absent seven years, and there is no evidence he is alive, the legal presumption is, that he is dead, and the estate and possession devolve upon him in remainder.

#### ART. 5. *Connecticut.*

This State was originally settled from Massachusetts, and the statutes of both are substantially the same, in most cases, as to deeds and conveyances, wills, descents, &c. ; but in the following cases those of Connecticut are materially different from those of Massachusetts on the same subjects, to wit :

§ 1. Deeds and conveyances in Connecticut are recorded

CH. 223. by town clerks in the towns in which the land conveyed by  
 Art. 6. it lies or is situated.

§ 2. A statute declares estates given in tail are estates in fee simple in the issue of the first donee.

§ 3. Any party to a fraudulent conveyance of lands, tenements, or hereditaments, or of goods or chattels, or to a contract or judgment to the intent to defraud creditors, forfeits one year's value of the real estate, and all the goods or monies, and is liable to half a year's imprisonment.

§ 4. A statute declares that a person disseized of lands &c. is disabled to convey them; and directs all leases for a term of more than one year to be acknowledged or proved and recorded.

§ 5. The several probate courts have power respectively to order real estates to be sold for the payment of the deceased's debts, and those of minors in certain cases.

§ 6. Also to require further security of executors and administrators, and to remove them if they neglect to give it. So in Massachusetts nearly, by a late act of 1818.

§ 7. A statute provides that if creditors or legatees are aggrieved by an appraisement of the estates of persons deceased, they may have, within six months after the first is returned, a new appraisement to be made by three appraisers.

§ 8. If there be no children of the intestate or issue thereof, or no descendants, the estate descends to the next of kin of the whole blood of the ancestors from whom derived; and relations of the whole blood are preferred to those of the half blood in equal degree.

See several cases in relation to the estates of husbands and wives, parent and child, guardian and ward, in prior chapters, depending partly on Connecticut statutes and partly on the principles of the common law.

§ 9. It has been settled in this State that a real British subject, (one of Bristol in England) who in 1773 was mortgagee of land in this State, and then died, and his estate descended to such subject, his heir, he in 1788 had a right to recover such land; and the court said, a State may exclude aliens from acquiring property in it, "but it would be against right that a division of a state or kingdom should work a forfeiture of property previously acquired under its laws." This title too is secured by the treaty of 1783; and also, a statute of the State, declaring aliens incapable of purchasing or holding lands in the State, confirms the plt's. title, by a *proviso* in the act declaring it shall not work a forfeiture of any lands held by British subjects before the late war.

ART. 6. *New York statutes* respecting deeds and conveyances, wills, descents, distributions, and settlements of estates.

These statutes do not appear to be framed after those of any other Colony or State directly ; yet as being derived from the same source, English laws, they seem to be the same in principle with those of Massachusetts, with however the following differences on the same subjects, to wit :

CH. 223.  
Art. 6.

§ 1. Statutes in New York have declared conveyances by fines to be good and valid, and have declared and directed the proceedings in levying them, and have prescribed the effects of them, and generally have placed them on the principles of the English laws.

§ 2. Deeds and conveyances in New York are, as in this State, placed on the grounds stated in the first article in this chapter. A deed to convey lands, tenements, or hereditaments, must be acknowledged or proved in a cautious and particular manner, and recorded. The wife is examined privily, as in Vermont &c. Grants of lands are declared to be good without attornment ; and all attornments of tenants are deemed void if made to strangers, unless made in pursuance of a judgment, order, or decree of court, and with the landlord's consent.

§ 3. A statute in New York has re-enacted the material parts of the English statute of uses, and gives all the remedies to the *cestui que use* the owner has. The lands and tenements are liable to be taken on executions against the *cestui que use*, and are declared to be assets in the hands of his heirs or devisees.

§ 4. Statutes in this State enact several matters which are common law in Massachusetts, as to warranties and frauds. As warranties made by tenants for life of lands, tenements, or hereditaments, after March 8, 1773, descending on those in remainder or reversion, and declared to be void and of no effect.

§ 5. A statute declares collateral warranties made by any ancestor having no estate of inheritance in possession, null and void as against his heirs.

§ 6. So statutes in New York declare deeds in trust for the grantors therein, and to the intent to defraud creditors or subsequent purchasers, null and void, as to such creditors and purchasers ; herein there seems to have been re-enacted the substance of the 13th & 27th of Queen Elizabeth, cited in a former chapter, and adopted as common law in Massachusetts. But these New York statutes do not affect *bonâ fide* conveyances or common recoveries, nor vouchers in writs of *formedon*.

§ 7. So statutes declare estates created by livery and seizin only or by parol, but as estates at will, except leases, not

CH. 223.  
Art. 6.

exceeding a term of three years, and reserving two thirds of the usual yearly rent

§ 8. Another act declares that no interest in or out of lands can be created, or granted, or assigned, but by writing signed, &c. and that all promises to convey or assign lands, or any interest in them, and all trusts, must be in writing, &c. except trusts resulting and by operation of law ; also, that all assignments of trusts must be in writing.

§ 9. Other statutes provide that lands, tenements or hereditaments, may be devised, but not to corporations ; and that wills concerning them must be proved in the court of Common Pleas in the county ; and that if the lands &c. devised in any will lie in several counties, it must be proved and recorded in the Supreme Court.

§ 10. Such of the executors, appointed in any will, as prove it, may sell and convey real estate devised in it to be sold. Nuncupative wills are in the usual form &c.

§ 11. By statute, also, a widow may bequeath her emblements, or crop, on her land held in dower, and a father, by deed or will, may appoint guardians to his minor children.

§ 12. Surrogates are appointed in each county by the governor and council, during pleasure, to prove wills and to grant letters of administration. Their powers are like those of our judges of probate. But in some cases, judges of probate are appointed, with like powers, to prove wills and grant letters of administration.

§ 13. By statute provision &c. probate bonds are taken to the people of the State, and such judges and surrogates cause them to be sued.

§ 14. They have power to enforce the execution of the decrees, by imprisoning the persons against whom made ; and last wills and testaments are, in certain cases, proved by a judge, as those of aliens, &c. and those in which a surrogate is executor.

§ 15. Statutes make special provision as to letters of administration in the city of New-York.

§ 16. A judge of probate or surrogate has power, on due notice to all persons interested, to license the sale of real estates for the payment of the deceased's debts, and if necessary to sell a certain part, and that if it is not divisible or capable of being divided without material injury, the whole thereof may be sold, and the surplus proceeds distributed among the heirs and devisees, &c. as the case may be.

§ 17. Where the estate of the deceased is insolvent, it is divided, proportionably, among his creditors without allowing any priority or preference of different kinds of debts. When real estates are sold, guardians are appointed to minors.

§ 18. By statute, an administrator *de bonis non*, has a writ of *scire facias* &c. on judgments recovered by any prior administrator or executor. So if a plt. or deft. die after an interlocutory judgment is recovered and before final judgment, and the debt survives, the executor of the executor or administrator has a *scire facias*; and damages are assessed, and final judgment rendered in the name of the new party.

CH. 223.

Art. 7.

§ 19. As to executors of their own wrong, the common law appears to be enacted into statute law, with several useful explanations.

§ 20. Another statute makes provision that real estates shall not be affected by judgments against executors and administrators, and makes the acts of administrators, done before notice of a will, good and valid.

§ 21. Inventories are formed by executors and administrators, with the aid of certain persons interested, as creditors &c. and by indenture.

§ 22. Statutes give actions of trespass for and against executors and administrators, for goods and chattels taken from or by their deceased testators or intestates, in their life-time.

*Distribution* of estate is equal, as in 22 & 23, Ch. II. and all advancements are estimated.

§ 23. Legatees and distributees may sue and recover their rights in any court of record, or legatee a proportionable part of his legacy, after demand made and security given.

§ 24. Guardians and next friends of minors are not allowed to recover legacies &c. due to them until security is given to account to them. And if the next of kin do not appear and claim his or her share in one year, it is paid into the State treasury.

§ 25. A statute limits a writ of right to 25 years. Opinions of Spencer J. & Kent C. J. 3 Johns. R. 296.—Per Kent C. J. 3 Johns. R. 394, the universal practice was, during the time of the colony, to convey estates by *lease and release*, and this practice continued till the abolition of the British statutes in 1788.

#### ART. 7. *New Jersey statutes, as to titles &c.*

§ 1. In this State conveyances of lands, tenements, and hereditaments, are by deed acknowledged and recorded in the office of the Secretary of State, or in the office of the County Clerk of the Common Pleas, and lodged in either within six months after executed. In this State, as in New-York, there are various ways to prove deeds, and which have been varied in the same State at different periods.

§ 2. If not so conducted, not valid, as against after *bond fide* purchasers or mortgagees for valuable consideration, and without notice; but valid as between the parties and their



СН. 223. heirs. The statutes, also, make authenticated copies of the record, as good evidence as the originals, as all interlineations, Art. 7. erasures, &c. are by law noted in the record.

§ 3. Statutes in this State against fraudulent deeds and conveyances are on the same principles as those in New York, stated in the last article ; except a statute in New Jersey declares a prior conveyance of lands &c. with a clause of reservation, void, as against a subsequent conveyance of the same lands &c. by the same person for good consideration.

§ 4. Also, a statute declares that a fraudulent conveyance shall not affect an after *bonâ fide* conveyance to a person having no notice or knowledge of the fraud, nor any *bonâ fide* mortgagee.

§ 5. Another statute declares that fines and common recoveries are no assurance of estates, or to bar the issue in tail, or those in remainder or reversion, of their lawful claims or entries.

§ 6. Another act declares that a sale of land, with or without warranty, by tenant in dower or for life, is void as to those in remainder or reversion, and that they may immediately enter ; and if she so sell, with an after husband, and he dies, she may enter after his death, into her first estate ; and that an alienation by tenant by the curtesy shall be no bar to the issue, of the inheritance of their mother, though there be a clause that he and his heirs shall be bound to warranty. And no parol demurrer for nonage is allowed.

§ 7. That a collateral warranty of lands &c. by an ancestor, who, at the time of making it, has no estate of inheritance in possession therein, shall be void as against his heirs.

§ 8. As to attornment, estates only by livery and seizin, by parol only, leases under three years, so as to interest in lands &c. grantable or assignable but by writing, see New York.

§ 9. Wills, till lately, were valid if attested but by two witnesses ; three now required. Copies of the registries of wills are made evidence.

§ 10. Copies of wills made and proved in Great Britain, or Ireland, or in any of the colonies, certified under seal, &c. made good evidence.

§ 11. Where lands, tenements, or hereditaments are devised in words, that, by the rules of law, give but estates for life, shall be construed in fee simple, unless words be used clearly and designedly intended to make them estates less than estates in fee simple.

§ 12. Another statute declares that estates tail shall be turned into estates in fee simple, in the heir of the first donee or devisee. Hence the entailment continues but for the life of the first donee or devisee, and the fee tail, in the next heir,

in the line of entailment, is turned into a fee simple. Estates *pur auter vie* may be devised, and if not, are assets, and distributed as personal estate. CH. 223.  
Art. 7.

§ 13. Another act directs that lands, tenements, and hereditaments, devised to, or to be sold by, executors, those of them who accept and act, shall have power to sell.

§ 14. Personal estate may be bequeathed, as at common law, but the writing must be recorded.

§ 15. Widows, by another act, may bequeath their emblements or crop, on their lands and dower.

§ 16. Fathers, by deed or will, have power to appoint guardians to their minor children not married, born or in *ventre sa mere*, though the father be a minor or of age, and such guardians may be as guardians in common socage, both in regard to the estate and the disposing of the custody and tuition.

§ 17. Administration is granted to the widow or next of kin; and inventories are made by executors and administrators, and two disinterested and respectable freeholders, on oath, and are lodged in the registry of the prerogative court, sworn to before the surrogate.

§ 18. Administration bonds are taken before the surrogate in each county, and to the surrogate general of the State. The condition is according to the 22 & 23 of Charles II.; and he can sue them in any court of record.

§ 19. The judge of the prerogative court may issue process to the sheriff, &c. to enforce his sentence or decree.

§ 20. The Orphan's Court, in each county, orders a distribution of the personal estate among the next of kin, and to the widow, as in New York; but if a wife die, her husband settles her personal estate to his own use.

§ 21. If the personal estate be insufficient to pay the debts of the deceased, on application of the executor or administrator to the Orphan's Court in the county, that court may order real estate to be sold, after due notice to all persons interested, and advertisements published.

§ 22. The estates, real and personal, of persons dying insolvent, are distributed equally among all the creditors, to each according to the amount of his debt; except physicians' bills in the last sickness of the deceased, funeral charges, and judgments entered against the deceased, are first paid.

§ 23. Executors and administrators are entitled to, and liable to, actions of trespass, for goods and chattels taken from and by their testators and intestates.

§ 24. An administrator *de bonis non* has a writ of *scire facias* on judgments, as in New York.

§ 25. An executor of his own wrong is described by statute,

CH. 223. and he may retain for all just debts he has paid, and all sums  
 Art. 8. and charges advanced.

§ 26. The statute of uses, in substance, is enacted in this State.

ART. 8. *Pennsylvania statutes* enact the following provisions on the subject of this chapter, to wit:—

§ 1. An office of registry of deeds is established in each county in the State, and is kept by a recorder, whose duty it is to record all deeds and conveyances brought to him; but before recorded, the deeds must be acknowledged or proved, by the justices of the peace, or in some of the various ways prescribed by law. And when thus recorded, they are declared to be of equal force as deeds of feoffment with livery and seizin. The certified copies are made as good evidence as the originals. Acts of 1715, 1775. Some old provisions, 1682, 1683, 1688.

Statute, A.  
 D. 1715 —  
 See c. 21.

§ 2. It is declared that the words, *grant, bargain, sell*, make an express covenant to the grantee, his heirs, and assigns, of seizin and of an indefeasible estate in fee simple.

§ 3. Mortgages to be valid, must be acknowledged and recorded within six calendar months; but if not, they are good against the mortgagor. Mortgages are discharged as in Massachusetts.

§ 4. Some deeds are to be acknowledged or proved before a judge of the Supreme Court, or a justice of the Common Pleas of the county in which the land conveyed lies, and recorded in six months after executed. The English statute of frauds has never been adopted in Pennsylvania, and her act does not make parol agreements for the sale of lands, void. Hence if A agree, by parol, to convey lands to B, and fails so to do, B may recover damages, though not the land. 4 Dallas, 152, Bell v. Andrews.

§ 5. And if not so acknowledged and recorded, they are void as against subsequent purchasers or mortgagees for valuable consideration, if not so recorded before the said after purchase is made. Deeds made out of the State must be recorded in twelve months; but certain cases are excepted, when possession goes with them.

§ 6. Where deeds are executed by husband and wife, she must be privily examined, as in New York or Vermont.

§ 7. Estates by parol or by livery and seizin only, leases exceeding three years, any interest in land not granted or assigned in writing, are as in New York.

§ 8. Since March 1777, an office for the probate and registering of wills, and for granting letters of administration, has been established in Philadelphia, and in each county in the

State, and an office for recording of deeds. A probate register is appointed in each, and commissioned by the governor; so a recorder of deeds: each takes an oath of office, and gives security for the faithful discharge of his duty to the Speaker of the House of Assembly. Each register of probate &c. appoints a deputy to officiate in his absence, and to be responsible for his conduct. And each deputy has power to take probate of wills, and to grant letters of administration, and to do all things appertaining to the said office.

CH. 223.  
Art. 8.

§ 9. The probate register takes bonds, on granting letters of administration, to himself,—condition, common form.

§ 10. Wills of lands, tenements, and hereditaments, are valid, if attested by two or more witnesses.

§ 11. The orphan's courts have power to compel administrators to make settlements and distributions of intestate estates, and to cause the said bonds to be sued in any court of justice;—an appeal lies. The administrators must return an inventory in one month, and settle his accounts in one year.

§ 12. It is also provided, that the debts of deceased persons not secured by matter of record, shall not be a *lien* on their real estates above seven years after the debtor's decease, unless the same be demanded or sued within that time; with the usual saving to minors &c.

§ 13. Executors and administrators are enabled to perform contracts in writing, made by their deceased testators and intestates, to convey real estate, by license of court.

§ 14. An appeal lies from the register's decree to the Supreme Court, where the sum is over £50.

§ 15. Distribution of personal, and descent of real estate intestate, is generally on the American principle of equality, among all relations in equal degree, as tenants in common; and real and personal estates are divided by the same rule. And if one, in equal degree, be dead, his or her issue takes his or her share, equally, on the common principle of representation. Some exceptions are peculiar to this State. The widow, if no issue of the deceased intestate, takes half of the real estate for life, or of the rents and profits, and half of the personal absolutely. If no widow or issue, the father has the personal estate absolutely, and the real for his life; but not if the estate come on the part of the mother of the deceased. If no widow or issue, equally to brothers and sisters, and representatives thereof, after the father's death. If no brother or sister, or issue thereof, the father takes the whole forever, except where the estate has descended on the part of the mother. And where the father is dead, the statute provides for the mother, on the same principle it above provides for

See the statutes, 1 Dallas, 20, 176, 350, 354, 481, 486.

CH. 223. him when living. Advancement is on the common ground.  
 Art. 8. So the case of a posthumous child, and children born after the making of the will, and not provided for in it. If the intestate leave no issue, father or mother, brother or sister, or issue thereof, of the whole blood, but brothers and sisters of the half blood, they and their issue &c. inherit the estate, except if the estate come from his or her ancestor, then all are excluded not of his or her blood. This detail extends further among remote relations &c.

§ 16. There are many priorities and preferences in paying debts, not material to be particularised ; but it merits attention that debts due to the State are paid last.

§ 17. Creditors must claim their dividends in a year, or be barred, where the estate is insolvent, after notice given and published. Nor can there be any distribution till one year is expired, and the usual bonds to refund are given. And all persons entitled to shares must claim them in seven years, or be barred, with the usual saving for minors &c.

§ 18. A naked authority to sell lands &c. vests the same interest in executors as is vested in them if the lands be devised to be sold.

§ 19. In the charter of Pennsylvania of A. D. 1700, it was provided, that the laws of England should take place in all matters and cases wherein no positive law of the province was made or existed. This provision ever after had an important effect, as it was a general adoption of English law, with only the exceptions of cases provided for by laws enacted in the province. But 1 Dallas, 67, held the statute of 21 Jam. I. c. 16, as to limitations, has never been adopted in this State ; but that the 32 H. VIII. c. 2. has been, and is in force on the same subject ; and sixty years' possession is the rule. Held also, that the common law of England has ever been in force in Pennsylvania. " Ejectment is almost the only action for trying titles to lands" here.

§ 20. By acts 1764 and 1794, if one make his will, and then marry, and dies, leaving a widow, or a child born after making his will, it is a revocation as to them, and they share in his estates as if no will were made. Construction, 3 Binney, 498, *Coates v. Hughes* ; 1 Washington's Virg. R. 140 ; 3 Call's Virg. R. A. D. 1802, on a similar clause in Virginia. See Ch. 93, a. 2, s. 8 ; Ch. 127, a. 8, s. 11 ; Mass. acts of 1700, and Feb. 6, 1784 ; and constructions thereof, Ch. 126, a. 2, s. 3.

The act of April 19, 1794, was, after it was enacted, the only act in force as to descents of estates, until another was enacted in 1797. By that of 1794, if one died intestate, leaving neither parents nor issue, or brothers or sisters, but

only nephews and nieces, there was no provision, but the estate descended to the heir at common law,—made law in Pennsylvania by the 6th section of the charter to William Penn, which provided, that the laws of England “for regulating and governing property, as well as for the descent and enjoyment of lands, as for the enjoyment and succession of goods and chattels,” be in force in Pennsylvania, till altered by the legislature of the Province. In 1797 a statute was enacted,—provision in such a case. 4 Dallas, 64, Johnson in *E. v. Haines’ lessee*.

CH. 223.

Art. 8.

Though lands in Pennsylvania may be sold for the payment of debtors, by statute law, and then a judgment against the debtor is a *lien* on his lands, yet if the creditor imprison him on a *ca. sa.*, and he is discharged by the insolvent act, the said *lien* is extinguished. 4 Dallas, 214, Freeman *v.* Ruston.

§ 21. An act of May 28, 1715, makes the words, *grant, bargain, sale*, an express covenant to the grantee, that the grantor was seized of an indefeasible estate in fee, free from incumbrances done or suffered by the grantor; and for quiet enjoyment against the grantor, his heirs, and assigns. Coop. Just. 617. Construed not to be a general warranty, 2 Binn. 95, Gratz *v.* Ewalt. 4 Dallas, 436, 446, may be controlled by a special warranty if so intended.

§ 22. An act of April 3, 1792, was passed for the sale of the vacant lands in the State, in part on the Virginia plan, prices fixed for each 100 acres. The second sect. offered for sale the vacant lands in the State, north and west of the rivers Ohio and Alleghany, and Conewango creek, to persons “who will cultivate, improve, and settle the same,” at £7. 10s. each 100 acres, to be located, surveyed, and secured to such purchasers. Third sect. provided, that on their application to the secretary of the land office, there should be granted a warrant to each, for a tract not exceeding 400 acres, and the surveyor to survey it for “the use of the grantee, his heirs, and assigns, forever.” Fourth sect. directed each deputy surveyor to keep a book in his office, and therein to enter the substance of the warrant, and the day of receiving it; this book to be open to all; copies to be given &c. Sect. 5 directed him to survey the lot at the grantee’s expense, avoiding lands actually settled and improved before the entry of the warrant, except for the settler thereon; that when the survey was made, the deputy surveyor was to enter it in another book to be kept by him, to be called the *survey book*, to be open to all, on paying eleven pence for each search; and each one entitled to a copy, on paying twenty-five cents for each copy. Sect. 6 directed all the land in a war-

3 Cranch, 1  
to 73, Huide-  
koper *v.*  
Douglass.

CH. 223. rant to be surveyed "in one entire tract," if to be found,—no front on a navigable river or lake to contain more than half the length of the lot; this to be as near as practicable an oblong, "whose length shall not be greater than twice the breadth thereof." Sect. 7 directed each deputy surveyor to make annual returns of his surveys to the surveyor general, connecting all his plots "together in one general draft," as far as contiguous to each other. Sect. 8 respected those who had settled on, and assigned them their lands on the above principles. Sect. 9 provided, that no warrant or survey should vest any title to land west of the Ohio, unless the grantee made, in two years after the date of his warrant, an actual settlement on his lot, "by clearing, fencing, and cultivating, at least two acres for every 100 acres" in his lot, built a house, and resided &c. five years: purchase money and interest remained a *lien* on the land, and if not paid &c. in ten years, the survey &c. became void. Sect. 11 provided for a *caveat* &c.; other sections provided for exemptions from taxes &c. These are the most material parts concisely stated, of a long act on the subject. In this system one defect is obvious, because it allowed the purchasers to pick and choose their locations, except merely the form of the lots; of course to leave tracts of land, regular or irregular, not granted, scattered all about among those granted; keeping boundaries and locations a long time extremely uncertain. Held, a grantee prevented performing the conditions of settlement by Indian enemies, saved his title by persisting in his endeavours to perform the said conditions. See the principles in partition of an intestate estate, Ch. 191, a. 5, s. 7, 8, 9, 10, in Pennsylvania.

§ 23. The statute of Pennsylvania provides, that "wills &c. being proved by two or more credible witnesses on their solemn affirmation, or by other legal proof, shall be good and available in law;" and then all estates, real and personal, are subject to one rule. The same act (of 1705) requires two or more witnesses to the probate of a *nuncupative* will, also to the revocation of a will. Held, 1 Dallas, 278, 288, Lewis, appellant, v. Maris, appellee, that the "legislature meant to require two witnesses in proof of every testamentary writing, whether for the disposition of real or personal estate;" and that "*other legal proof* was put in opposition to *solemn affirmation*," in order to admit proof on oath. The Roman law till the time of Justinian required seven witnesses.

§ 24. Lands in Pennsylvania are considered as chattels in the payment of debts, and may be taken in execution on a *fi. fa.* directed to the officer to levy of the goods and chattels of the debtor. 2 Dallas 293, 294, Andrews' lessee v. Fleming. The same in Delaware.

CH. 223.

Art. 9.

§ 25. Real property in Pennsylvania is assets for the payment of debts; and is always to be applied in case of a deficiency of personal property. And a judgment of the Supreme Court in a cause removed from an inferior court, is a *lien* on the debt's land throughout the State. 2 Dallas, 158, 160, *Ralston, assignee, v. Bell*; *Morris' executors v. M'Connaughy*. And a sale of lands by executors under a power to pay debts is valid against creditors; but not under a power to sell to pay legacies. 2 Dallas, 291, 293, *Hannum & al. plts. in error v. Spear*—was in the High Court of Errors and Appeals, and reversed the judgment of the Supreme Court; and these lands are sold on execution to satisfy the judgment. 2 Dallas, 131 &c.

§ 26. The purchaser of lands of a deceased person, sold by order of the Orphan's Court since April 19, 1794, holds them discharged from the lien of a judgment obtained against the intestate in his lifetime, and from other debts of his, on two statutes, one enacted in 1705, and the other April 19, 1794, which extend to all parts of the State. *Molierer's lessee v. Noe*, 4 Dallas, 450. Ever since 1705, the Orphan's Court has had power to order the sale of such part of the lands of intestates, as they judged necessary for the payment of their debts, the education and maintenance of their infant children, and improvement of the rest of the estate.

ART. 9. *Delaware statutes*, respecting deeds and conveyances, wills, descent, distributions, &c. are generally the same as those on these subjects in Pennsylvania. However, the following particulars merit special notice, to wit:

§ 1. A statute declares fines and common recoveries of estates tail good and valid, as in England.

§ 2. Executors and administrators have power to convey lands &c. contracted by the deceased to be sold and conveyed, but confined to writings sealed.

§ 3. Lands and real estates may be sold to pay the debts of the deceased, also to maintain his children, and to teach them to read and write, and to put boys out apprentices, and for the improvement of the rest of the estate, as the Orphan's Court in each county may direct.

§ 4. The justices of the quarter sessions in each county hold the Orphan's Court, award process, &c.; and by it administrators and executors may be required to give additional and better security; and by it their letters of administration may be revoked.

§ 5. If a minor's money be put out at interest on such terms and security as the Orphan's Court directs, and any loss happens by reason of the insufficiency of the security, it is the minor's; but it can be lent but for one year at any one time.



CH. 223.

Art. 10.

§ 6. There is a court of delegates in each county; this is a court of record, held by three delegates appointed and commissioned by the governor; to it appeals lie from the register of probate and appeals;—also lie from the Orphan's Court to the Supreme Court.

§ 7. Executors and administrators are so strictly forbidden to pay any debts but those legally recoverable, that they can pay no debt whatever not so recoverable.

§ 8. Probate bonds of executors &c., though given to the register in each country, are given to the State as obligee; and a bond of an infant executor or executrix above seventeen years old, is declared to be as valid as if of age. Proceedings on probate bonds are peculiar. The husband gives such bond for his wife when executrix.

§ 9. Distribution of personal and descent of real estate, are generally on the American principles of equality. But the eldest son had a double share till 1794. The whole and half blood, in some specified cases share equally, and in some not. If there be no issue of the intestate, his widow has half of his real estate for her life. Partition of his estate is made by five freeholders appointed by the Orphan's Court.

ART. 10. *Maryland statutes* as to titles to property &c., to wit:

See more of  
Maryland  
statute titles,  
District of  
Columbia,  
art. 18.

§ 1. They declare common recoveries suffered by tenants in tail, valid, that had been suffered in certain cases, though not by proper tenants to the *præcipe* &c., and though not executed: and that tenants seized in fee tail may convey their estates, as tenants in fee simple may, that is, wherever the tenant in tail could by a common recovery.

§ 2. From a very early period no interests in and out of lands, tenements, and hereditaments in Maryland, except leases for less than seven years, have passed, been created or conveyed but by deed, and that in some specified manner acknowledged, or proved, and enrolled, or recorded in some limited time, as six calendar months &c. in the county or district in which the land conveyed is situated, or by matter of record. Statute A. D. 1766, when the deed is acknowledged and enrolled it operates from the delivery. 1 Cranch, 250.

§ 3. And every *feme covert*, conveying her estate or interest with her husband, is, and has been examined privily, and apart from him when she acknowledges her deed, whether it be her free act and deed, or not.

§ 4. *Orphan's Court*. This consists of three men of integrity and judgment in the county, appointed and commissioned by the governor, with advice of council; their powers and duties nearly the same as those of judges of probate in Massachu-

setts;—are sworn &c., but they also must declare their belief in the Christian religion, and may try facts by a jury held in each county every two months. The register of wills is the recorder of this court in each county.

CH. 223.

Art. 10.

§ 5. *Wills.* January 1799, a long statute of about sixty pages was passed, regulating in much detail, matters of wills and administration. This was a general revision of former laws on these subjects. In this statute are many valuable provisions and much correct law; several matters of substance it may be here selected. It makes: 1. All descendible estates devisable, except estates in tail.

§ 2. Males twenty-one years of age and females eighteen, have power to devise their estates by writing signed and attested in the usual manner by three witnesses; and office copies of wills, duly proved, are made good evidence.

§ 3. The Orphan's Court proves wills &c. of personal estate; from it is an appeal to the Court of Chancery, or to the General Court. The register of wills can prove them in the recess of the Orphan's Court. And an action lies on an authenticated copy of the executor's bond to the State as obligee, the condition of which is in a prescribed form; as is also the oath and letters of administration, and letters to collect and preserve the debts, credits, and goods of the deceased.

§ 4. If the executor be under eighteen years of age an administrator during his minority is appointed. So one is appointed, if the executor be an alien, or incapable, or convicted of an infamous crime. The act prescribes the manner of trying if a minor, an alien, idiot, lunatic, *non compos*, madman, or such convict, and declares the bond of the executor eighteen years old, valid; and that one so disqualified to be an executor is disqualified to be an administrator,—and is so tried.

§ 5. This act prescribes the mode of granting administration on the personal estate; and declares acts done under it valid till revoked; and that actions in law or equity commenced by such administrator may be prosecuted by the executor, and judgment rendered in his name. The same law as to a defence. And he is bound by judgments obtained by such administrator, with some exceptions.

§ 6. By this act the *choses in action* of the wife on her decease, devolve on the husband, without his taking administration; but if he die before he collects them, or gets judgment for them, they devolve on her representative, and administration is granted accordingly.

§ 7. This act prescribes nearly the usual order of persons to whom administration is granted, but gives a preference of males to females in equal degree; and relations on the father's side are preferred to those on the mother's, in equal

CH. 223. degree. And if no relations to administer, administration is to  
 Art. 10. the largest creditor applying for it.

§ 8. The inventory is made by two persons disinterested and not related to the deceased. The act prescribes the form of their warrant, and very minute proceedings; and that the crop on the land at the death of the owner &c. be appraised, and accounted for in a certain manner by the heir or administrator. Assets minutely described; as estates *pur autre vie*, all kinds of goods and chattels, slaves, &c. except heir-looms, widow's clothes, ornaments, and jewels proper for her station, and clothing of the family, these are not inventoried.

§ 9. By this act executors and administrators settle their accounts in fifteen calendar months after date of letter of administration &c. Inventories they return, and exact accounts of the increase of the estates and decrease thereof in their hands, and are allowed for the decrease, if without their fault. They may sue any action the testator or intestate might, except of slander, or for torts to the person. So they are liable to any action he might have been sued in, except as aforesaid, and are made entitled to and liable for costs, as he might have been,—not to be held to special bail.

§ 10. If assets are not sufficient to pay all debts, judgment for any debt is rendered for its proportion, and an auditor may be appointed to report it; and further assets and further proportion is allowed. But judgments and decrees against the deceased are first wholly paid, and other claims are on an equal footing. An executor or administrator can retain for his own debt no more than the Orphan's Court allows on a reference, issue tried, or otherwise.

§ 11. This acts requires claims against the deceased's estate to be proved by very full and minute evidence, and a very strict settlement of the accounts and debts due to it.

§ 12. *Distribution of personal estate.* If the intestate leave no descendant, parent, brother, or sister, or child thereof, his widow takes all. Otherwise the statute distributes the estate, nearly as the English statute of distributions does, except if no relations within the fifth degree, counting down from the common ancestor to the most remote degree, the residue *escheats* to the State.

§ 13. Guardians are appointed to males under twenty-one years of age, and to females under sixteen, or till marriage under sixteen, by will or Orphan's Court;—may be called on to give new bonds;—forms prescribed. In their inventories the value of the annual income is included. Act is strict against waste, but the court may allow them to cut down wood, accounting for it.

§ 14. This act prescribes many rules for ascertaining the

rights of widows, as to what shall bar them of their dower, or share in the personal estate. CH. 223.  
Art. 11.

§ 14. Sureties may have counter security in the cases of probate bonds, by the directions of the Orphan's Courts, which have power to summon persons concerned in the deceased's estate and witnesses, and on non-appearance after proper time &c. to attach and sequester their estates or part thereof, and give possession thereof to proper persons, (real or personal)—such persons give bonds to the State to account &c.

§ 15. The orphan (or probate) courts have chancery powers, to require answers on oath, to fine, attach, sequester, &c. and to form issues to be tried in the most convenient law court, to give costs in all cases at discretion, and to enforce payment by attachment of the body, or by fine, attachment or sequestration, as above. Appeals to the Court of Chancery or General Court.

§ 16. In summary proceedings and an appeal, all the testimony is put in writing, and sent by the register of wills to the court appealed to.

§ 17. Sequestered property may be sold by order of the Orphan's Court, when necessary to pay monies become due,—and was at first a temporary act.

§ 18. In Maryland the descent of an intestate estate is not regulated by statute, but is at common law : 1. If derived to the intestate from his half brother : 2. From his brother of the whole blood : 3. From his son or daughter : 4. From his wife : 5. Executory devise settled on the case of *Pells v. Brown* and other English cases : 6. One tenant in common cannot have ejectment against another, but on actual *ouster* ; according *Doe v. Prosser*, and other English cases. Statute of descents of Maryland, passed 1786 ; by the general principles of this statute, the descent is to the next of kin equally, with many nice distinctions as to the paternal estates &c.

7 Cranch, 456, 471, Barnitz's lessee v. Casey.

ART. 11. *Virginia statutes.* As to deeds and conveyances, wills, descents, distributions, &c.—these, (next to those of Massachusetts,) have been the root to titles to property in many Colonies and States. They seem to be well and concisely worded ; though important, fill but a few pages. Those of Massachusetts on these, as on other subjects, have been considered at large, as in former chapters. These of Virginia, as the germ of titles in many places, now deserve considerable attention in this sketch. They provide as follows :

See more of the laws of Virginia, Kentucky, a. 15, and Columbia, a. 18 ; Ch. 178, a. 14 ; Ch. 228 ; the English laws were adopted generally in Virginia in 1661, by her legislature, as far as applicable to her situation.

§ 1. That no interest or estate in or out of lands, tenements, or hereditaments, shall be conveyed, (except leases for not more than five years,) but by writing, sealed and delivered. And conveyances are void as against purchasers for valuable considerations and without notice, or any creditor, if not so

CH. 223.

Art. 11.

by deed acknowledged, or proved in a specified manner, by three witnesses, before the General Court, or before the court of that district, county, city, or corporation, in which "the land conveyed, or some part thereof, lieth;" within eight months after delivered, to be lodged with the clerk of such courts, to be there recorded. See 44, Colony Statutes.

§ 2. The same principle is adopted respecting agreements made in consideration of marriage, if land be therein charged, or if only personal estate be settled or agreed to be settled or paid. This recording contracts as to personal estate, is a practice found in the civil law. In that there was provision for putting all nominal stipulations in writing on record. A proper officer registered them *inter acta*, and gave the parties a copy. This was not the case of mere *pacts*, *innominate agreements*, on which lay no specification, but only an action on the case, *in factum*.

§ 3. Where the law requires livery of seizin to be made and entered on such deed of land &c., and to be acknowledged or proved, the same must be recorded with the deed.

§ 4. These acts declare that all conveyances, settlements, trusts, and mortgages of lands, tenements, and hereditaments, and chattels, null and void, as to subsequent purchasers and creditors, if not so acknowledged or proved and recorded, though binding the parties and their heirs. Construction, 3 Cranch, 140, 159; 3 Hen. & M. 232, Moore's Exr. v. The Auditor.

§ 5. That deeds by husband and wife of her estate or interest, shall be valid, if acknowledged in a prescribed form, and if she be privily examined apart from him; and "she shall declare that she willingly signed and sealed the said writing," and consents that it be recorded; and this examination must be returned and recorded.

§ 6. These acts direct the manner and form of recording and docketing conveyances; and that all such docketts made in the district and county courts, must be yearly transmitted to the clerk of the General Court, to be there recorded by the clerk of it.

§ 7. Persons having estates in tail, are declared to stand seized in fee simple, both as to lands, tenements, and slaves; and this has been the law since October 7, 1776, except as to *escheats*; and such estate is made liable to debts, and to be disposed of by will or deed, as estates in fee simple are. And 1 Hen. & Mun. 240 to 302.

§ 8. The statutes also declare that every estate in lands, devised or conveyed, is deemed a *fee simple*, unless a less estate is limited, or unless by construction or operation of law. [This important law supposes every grantor and deviser

means a fee simple, if he do not limit a less estate in his deed or will.] Act of 1785, which took effect Jan. 1, 1787.

CH. 223.  
Art. 11.

§ 9. If an estate, being conveyed, is limited in remainder to a son or daughter, or to the use of a son or daughter of any person to be begotten, and he or she is born after the death of his or her father, takes the same as if born in his life-time, though no estate is conveyed to support such contingent remainder after his death. By statute also the possession of an estate is annexed to the use &c.

§ 10. All estates held in trust are declared to be liable for the debts or charges of the *cestui que trust* or *use*, as the same would be if he had the like interest in the thing held, he has in the use or trust thereof. So trust estates in lands are declared to be subject to dower and curtesy of the wife or husband of *cestui que use or trust*, as legal estates are.

Grants of rents, reversions, &c. are declared to be good and valid without attornment of the tenant, and that the attornment of the tenant to a stranger is void, if not with the consent of the landlord, or on a judgment of a court of law, or a decree of a court of equity.

§ 11. The English statutes to prevent fraud to creditors, and as to executors and administrators,—as to undertaking for the debt or default of another,—as to promises in consideration of marriage,—as to contracts for the sale of lands &c., or any interest therein, for more than a year &c. &c., not in writing &c. are, in substance, enacted in Virginia.

§ 12. Conveyances of goods and chattels, not on considerations deemed valuable in law, are declared to be fraudulent, unless by will or deed, and proved and recorded, if the same deed include lands also;—and if of goods and chattels only, then to be acknowledged or proved by two witnesses in the General Court, or court of the county wherein one of the parties lives within eight months after made, or unless possession, *bonâ fide*, remain with the donee. This principle is extended to goods claimed as loaned &c.

§ 13. All alienations and warranties of lands, tenements, and hereditaments, made by any person, purporting to pass or assure a greater estate or right, than such person may lawfully pass or assure, are declared to operate only on such right or estate, as he has and may lawfully convey, and no more, and not to bar the residue of the right of the estate purported to be conveyed or assured. But if the alienor “mention that he and his heirs shall be bound to warranty, and any heritage on his side descend in the present or future time to the demandant, then he is barred to the value of this heritage.”

§ 14. A Virginia statute enacts the substance of the 32 H.

CH. 228. VIII. c. 34. respecting assignees of reversions on leases &c.,  
 Art. 11. and of lessoes &c. cited at large, Ch. 110.

§ 15. *Wills.* Last wills and testaments are in use in Virginia as in the other States; but if not wholly written by the testator, they must be attested by two or more credible witnesses, subscribing their names in his presence. [The seizin of the testator does not appear to be required.] No person under eighteen years of age can, by will, dispose of his chattels. See Kentucky, art. 15.

§ 16. District, county, and corporation courts, have the probate of wills in their respective jurisdictions; and it is declared, that any time within seven years after a will is proved, it may be contested on a petition in the Court of Chancery; and if the party's will or not, is a question to be tried on an issue formed for the purpose; but it cannot be contested after the seven years are expired; but there is the usual saving for minors, married women, &c.

§ 17. These statutes also provide that temporary administrators may be appointed, as *pendente lite*, during minority, to collect and preserve the personal estate of the deceased &c., giving bonds, and returning inventories &c.

§ 18. The distribution of personal estates is on the common American principle, derived from the English statute of distributions; except, however, the widow has her share in the slaves but for her life. And these Virginia statutes enact, that personal estate shall be divided among heirs as real estate descends.

§ 19. Administration is granted to the husband or to the wife, as the case is, and next to those next entitled to shares in distributions, to one or more of them; if none such apply for it in thirty days &c., then to any creditor or creditors applying for it, or to any other person the court may deem fit.

§ 20. Probate bonds are taken to the sitting justices of the court, and to their successors in office. And sureties are declared not to be liable in their own estates for the bad pleadings of executors or administrators;—and the said justices are made liable, if the security taken be not good when taken;—and sureties are enabled to call on executors and administrators for counter-security, under the direction of the court.

§ 21. Provision is made in these acts that the clerks in the district, county, and corporation courts, shall annually return to the clerk of the General Court a list of all certificates of probates of wills, and of administrations granted, to be recorded in the General Court alphabetically, with such certificates granted in the General Court. [This record, kept at one point in the State, contains all material information on the subject.]

§ 22. Inventories are made by three appraisers appointed by the court. The inventory is declared to be not conclusive evidence of the value. And dead victuals and liquors laid in for family use, are not appraised or accounted for. And a child leaving the family may carry away his or her part of them.

CH. 223.

Art. 11.

§ 23. It is declared that when lands are devised to be sold, the acting executors or administrators shall have power to sell them;—that crops on the lands of the deceased, from the first of March to December 31, shall be assets in the hands of executors and administrators;—and that slaves and servants shall be retained on the farm that time, so far as employed in raising the crop, and at the end of said period, delivered, well clothed, to those having a right to demand them. This provision is in cases in which the testator or intestate dies after the first of March, and before December 31, and at his death occupied the said farm or plantation. But the crop or emblements on the land between December 31st and March 1st, and the decedent dies in that time, pass with the land to the heir or devisee, reversioner or remainder man, as the case may be.

§ 24. If tenant for life of lands or slaves, let or hired to another person, die after the first of March, the lessee or person hiring, holds them to December 31, paying rent or hire to that time, and then delivers the slaves well clothed &c.

§ 25. A statute declares that if a debtor be appointed executor, this, in no case, shall extinguish his debt.

§ 26. In suits against executors and administrators on open accounts, the court is directed to expunge all items due five years or more before the decedent's death, with a saving to minors and other disabled persons of three years after the disability removed;—and a penalty of tenfold is inflicted for post-dating any item.

§ 27. Suits against executors and administrators on judgments, are limited to five years after they are qualified, with a like saving of three years;—and may have, and are liable to, actions of trespass for goods taken from, or by their testators or intestates. And an executor of an executor is allowed; and also executors and administrators are made liable for the waste done by the executors and administrators on the estate before them.

§ 28. Provided, that slaves be not sold to pay debts until after all the other personal estate is sold. By a Virginia act of 1758, no gift of a slave was valid, unless in writing and recorded. How far parol evidence will apply, see Ch. 93 a. 3, s. 35; 4 Cranch, 398, 200.



CH. 223. In 1784, a similar law was enacted, and making a parol gift void, though possession accompany the gift, 4 Cranch, 400; five years' adverse possession gives a title, 402.

Art. 11.

§ 29. Devises of lands, rents, &c. since December 1789, are declared void; as to creditors by specialties, in which heirs are bound; and heirs and devisees are made jointly liable to the amount of the lands so descended or devised, of which the deceased is seized at the time of his death, in fee simple in possession, remainder, or reversion, or has power to dispose of by will; and devisees are made liable for false pleas, as heirs are; with exceptions of devises to pay just debts or portions in pursuance of any marriage contract in writing, for a child or children other than the heir at law.

§ 30. Where an heir at law is liable for debts, he is declared to be held to the value of the estate descended to him, though he alienates it before he is sued; that estate, however, which is *bond fide* sold is not liable. The heir may plead *riens per descent*, and the plt. may reply he had lands &c. by descent &c. before the action was brought or bill filed. Devisees are made liable as heirs are.

6 Cranch, 154, *Pierce v. Turner* in error.

§ 31. *Construction of the Virginia statutes as to conveyances.* See s. 1, 2, &c. Held, (Johnson J. dissenting) a marriage settlement which conveyed the intended wife's land and slaves to trustees by deed, to which the intended husband was a party, consenting to be held in trust till her marriage to the use of herself; after it, to the use of her and him and longest liver of them; and after their deaths to the use of her heirs, is valid, though not recorded, and protects the property from the husband's creditors. He, after the intermarriage, died, and she possessing and claiming the slaves as her own, and possessing them and lands by the trustees' assent, was sued by his creditor as executrix in her own wrong. Act of Virginia, Dec, 13, 1792, enacted as above, that all conveyances of land, marriage settlement of lands, slaves, or other personal property, deeds of trust and mortgages thereafter made, should be void as to all creditors and subsequent purchasers, if not proved and recorded in eight months, as above: "but that the same as between the parties and their heirs should nevertheless be valid," though not recorded. This deed was not recorded, yet deemed valid among the parties; so effectually vested her estate in the trustees, and the creditors intended by the statute were hers, the grantor's, not her husband's creditors, hence *Pierce*, his creditor, could not object to it.

See Ch. 39, a. 8, s. 1.

9 Cranch, 19.

§ 32. One of the land laws of Virginia extending to Kentucky, gave a right of preemption to those who had marked and improved lands before the year 1778, and referred that right to the time when the improvement was made and to the

time of passing the act of 1779, and not to the time when the claim for such preemption was made before the Court of Commissioners. From improvements vague and uncertain in large tracts of lands, without any precise boundaries, the courts in Kentucky found themselves obliged to adopt a rule thus vague and imaginary, to wit: in failure to describe the external figure of a tract of land, the bounds of it to be supplied by supposing and placing the improvement in the centre, and drawing round it a square with the lines to the cardinal points, comprehending the quantity claimed by the location.

§ 33. *Mortgage of goods* is void as to creditors and after purchasers, if not acknowledged or proved by these witnesses, and recorded as conveyances of lands must be. Rev. Code, 157, of 1802.

Ch. 223.  
Art. 11.

§ 34. *Construction of the Virginia statute as to bastards.* Before the year 1775, Hugh Stevenson of Virginia, cohabited with Ann Whaley and had by her the appellants, whom he recognised as his children. July 1775, he made his will duly proved. In it he described them as the children of himself and his wife Ann, and devised all his estate to her and them. June 1776, he was appointed a colonel in the Virginia line of the American army. In July 1776, he married said Ann, and died in the service August 1776, leaving her pregnant of a son afterwards born, and named Richard Stevenson. After the father's death and Richard's birth a warrant for 6666 acres and two thirds of military lands was granted by Virginia to said Richard, who died in 1796, a minor, without wife or child, and not having located or disposed of his warrant. His mother died before 1796. The defts. claimed under John Stevenson, the elder paternal uncle of said Richard. Pk's. bill was dismissed below, and they appealed.

3 Cranch,  
140, 159,  
Hodgson v.  
Butts.

5 Wheaton,  
207 to 268,  
Stevenson's  
heirs v. Sulliv-  
ant in Chan-  
cery, lands in  
Ohio.

The appellants claimed mainly on the 18 and 19 sections of the act of descents, enacted in Virginia in 1785, and come into operation January 1, 1787;—18th was in these words, "In making titles by descent it shall be no bar to a party that any ancestor through whom he derives his descent from the intestate is, or hath been an alien. Bastards, also, shall be capable of inheriting or transmitting inheritances on the part of their mother in like manner, as if they had been lawfully begotten of such mother."

The 19th section is as follows: "Where a man having by a woman one or more children, shall afterwards intermarry with such woman, such child or children, if recognised by him, shall be thereby legitimated." Held, 1. The appellants did not take as devisees; in fact the testator never had any interest in the land; this point was not much relied on: 2. They take not under said 18th section, as they thereby could only

## CH. 223.

## Art. 11.

See Barnitz's  
lessee v. Ca-  
sey, 7  
Cranch, 456.

inherit from their mother, and transmit their inheritances in their descending line ; that bastards under that section cannot inherit collateral, or be inherited by them, though on the mother's side ; this was understood to be the first construction of this section : 3. That the appellants could not take under the 19th section, because their father, Hugh Stevenson, did not recognise them and die after the act came into operation. Several reasons were given, but the best was, that the father, when he recognises his bastard children to make them heirs &c., ought to know of this new law, in order he may see the full effect of his recognition, otherwise he may make heirs to his estate contrary to his intentions, and the section might have been retrospective. Also the construction now given of this 19th section had been given by the Supreme Court of Errors in Virginia. See *Rice v. Efford*, 3 Hen. & Mun. 225 ; and *Sleighs v. Strider*, Id. ; and *Stones v. Keeling*, Id. The same is said to be the law in Kentucky, derived from Virginia, and the same as to many estates in the State of Ohio. The cause was ably and very elaborately argued ; see the arguments in over fifty pages, and in a note the laws as to illegitimates among the Jews, Greeks, Romans, French, Scots, &c. In 1785, also, three other long acts were enacted and commenced operation the same first day of January 1787, one respecting marriage, one dower, and one distributions and wills. These three, with said statute of descent, have since been the main foundation in Virginia and Kentucky, of titles by descent, by wills, in dower and curtesy. We have seen in Massachusetts and Maine there is a provision enacted in March 1806, by which the estate in certain cases descends to the paternal or maternal stock alone from whence it came. It is understood there is in Virginia and Kentucky a like provision. This often leads us to inquire who was the first purchaser of the estate.

1 Hen. & M.  
4, Guer-  
rant v. Fow-  
ler & al.—  
See Ch. 226,  
a. 18, s. 5.  
Same as to  
counties.  
3 Hen. & M.  
136, Aldridge  
& al. v. Giles  
& al.—  
Hind's Ch.  
Prac. 429.—  
Farley v.  
Shippen,  
Wythe's R.  
136.

§ 35. *Construction of a Virginia statute as to lands.* Rev. Cod. vol. 1, ch. 64, s. 29 ; Held, that the Superior Court of Chancery has power to decree a person being within the State to execute a conveyance for lands lying in another State, or to cancel a deed for such lands obtained by fraud. One deft. lived in Virginia, the other in Kentucky, where the land was ; both appeared and filed a plea in abatement to the court's jurisdiction, because the land lay in another State. The construction of the statute was, that in this case it left the court to exercise its jurisdiction on general principles, and held, that on these it could act in *personam* on all persons within its jurisdiction, but not on land in another State, as to make partition &c. : 2. That a deed might well be executed in one State, of land in another : 3. A fraudulent deed of land

in one State may be cancelled in another. A like decision was had in 1794, as to land in North Carolina. Cited 3 Ves. jun. 170; and 5 Ves. jun. 277, Lord Cranstown *v.* Johnston. The powers being general equity powers on which these decrees were made, apply to our equity courts generally. In the last case a decree was made in England *in personam* to reconvey lands in the British West Indies.

CH. 223.  
Art. 11.

§ 36. Though a statute of Virginia gives an action at law for waste, and power to prevent it, *pendente lite*, yet an injunction to stay it, is generally a proper subject for the jurisdiction of a court of equity. In this State the surety of an executor or administrator cannot be sued at law or in equity, till a *devastavit* is fixed on the principal. 1 Hen. & Mun. 11. And whenever an objection to a bill in equity appears on the face of it, it may be demurred to; when not, the proper defence is by plea or answer. Id. 17. This is general law; see Mitford's Pleadings, 177. The officer's return on an execution against an executor, that he has moved out of the State, is not sufficient evidence of waste to enable the county justice to sue on the probate bond to whom given.

1 Hen. & M.  
17, 18, Harris  
*v.* Thomas.

§ 37. *How, and how long a will may be disputed.* Held, 1. That, after the probate of a will, any person interested, who had not appeared to contest such probate, may, within seven years, file a bill in equity to contest its validity. 2. If such a person appeared and contested it, he may file such bill, on the ground of *fraud* not known to him at the time of the probate. 3. Though a will has been recorded in a *District Court*, a *County Court* in Chancery has jurisdiction to try its validity. 4. This court may direct an issue to be tried on the common-law side of the same court. 5. On a jury trial, if the evidence adduced do not appear on the record, all is to be presumed correct. 6. On such issue, chancery ought to direct as to the reading of the papers filed in the cause, otherwise omitting to read any of them on the trial of such issue will not be a ground for reversing the proceedings, if the Court of Chancery refuse a new trial. 7. When the verdict in such case is certified to the court sitting in chancery, and a new trial refused, and at the trial there are certain allegations, but no record of them, but they are stated in a bill of exceptions to the court's opinion refusing a new trial, they are not to be deemed as true by the court's signing and sealing such bill. 8. An issue to try the validity of a will has the same effect as an issue to try if the writing be a will or not. It appears the county courts in Virginia, of which there are about 100, have an equity side, and a common-law side, and jury trial. In this case, "a declaration was drawn, stating a wager, that the paper purporting to be the will was not

Turner & al.  
*v.* Chinn's  
exrs., 1 Hen.  
& M. 53.

1 Hen. & M.  
71, Ford *v.*  
Gardner & al.


1 Rev. Code,  
c. 92, s. 11, p.  
161.

1 Rev. Code,  
c. 64, s. 13,  
p. 64; c. 67,  
s. 56, p. 91.—

2 Ld. Raym.  
860.

See the Can-  
sus of 1820.

CH. 223. *valid*;" the jury found it *not valid*. The first appeal was to the District Court of Charlottesville; the second, to the High Court of Chancery; and the third to the Court of Appeals.

Art. 11.  § 38. *Dower in a trust estate by statute*. It seems the widow is entitled to it in an *equitable estate in fee simple*, contracted by *verbal* agreement to be conveyed to her late husband, if such a contract as would authorize equity to decree a legal estate. 2. The statute of frauds avails the deft., though not *formally* pleaded. 3. It especially applies, where the verbal evidence of an agreement is contradictory and is against such evidence. The verbal agreement was between father and son, and he, at his father's request, moved on to the land and made considerable improvement. Majority of the court in favour of the father: the evidence rather proving the son was to have only a *life estate* if he left no issue. His widow claimed dower, and he left no issue.

1 Hen. & M. 91, 108, Rowton v. Rowton.—Virginia stat. of 1785. 1 H. & Mun. 367, dower must be brought against tenant of the freehold &c.—Equity need not direct an issue.—1 Hen. & M. 372, Nice v. Purcell.

1 Hen. & M. 133, Hudgins v. Wrights.—Stat. 1670, 1691. Vance v. Walker, 8 Hen. & M. 288.—Ch. 93, a. 3, s. 35.—2 Hen. & M. 149, 161, Pal-las & al. v. Hill 6 cases. See Hannah & al. v. Davis.—1 Wash. 123; Id. 239. Patten & al. v. Collins.

§ 39. *Slavery under ancient statutes in Virginia*. Held, 1. Where *white* persons, or native *American Indians*, or their descendants in the *maternal* line, are claimed as *slaves*, the *onus probandi* is on the claimant. *Secus* as to native *Africans* and their descendants, who have been, and are now held in slavery. 2. *No native American Indians* could be made slaves under the laws of Virginia since the year 1691. 3. If the *female ancestor* of a person asserting a right to freedom is proved to have been an Indian, it is incumbent on those who claim such person as a slave, to shew that such ancestor, or some female from whom she descended, was brought into Virginia between the years 1679 and 1691, and under circumstances, which, by the laws then in force, created a right to hold in slavery. The court, in these cases, as in others, gave the statutes of this State a very liberal construction in favour of freedom. The persons claimed as slaves were allowed to sue in *forma pauperis*. Jenkins v. Tom and Coleman v. Dick.—Emancipated by will may be sold for term of years to pay testator's debts. 1 Hen. & Mun. 519; 2 Hen. & M. 193, 211, Pegram v. Isabell.

1 Hen. & M. 212, 235, Robinson's adm'r. v. Brock. Action was commenced in a district court at law. Settlement March 24, 1788. Appeal from said

§ 40. *Cases involving trusts, slaves, maternal and paternal estates in Virginia; also, marriage settlements*. This was an action of *detinue* for ten slaves, brought by C. C. Robinson, administrator of B. Robinson, with his will annexed, against Jos. Brock. Plea, *non detinet*; and issue. The special verdict found that, by a marriage certain slaves and lands were conveyed in trust to Brock for the use of the husband and wife for life, and the life of the survivor; and after their deaths to the use of the children of the marriage; and if no child, then the lands and part of the slaves for the use of the hus-

band's heirs, or such person as he should appoint and direct ; and the other part of the slaves for the use of the wife's heirs, or to be disposed of as she should appoint and direct. She died, and her husband survived without any child. He died Jan. 1796, possessing the slaves. No appointment was made. Held, 1. The husband's heirs could not take those slaves conveyed to the wife's heir : 2. They should go to her next of kin : 3. The trustee being dead, the heirs of the husband or wife could maintain *detinue* for the slaves conveyed to their use respectively : 4. A special verdict is bad, which does not state all the circumstances existing necessary to give the plt. titles to what he sues for : 5. A *venire facias de novo* must be awarded. The lands and slaves (except two,) conveyed to the husband's heirs were such as originally belonged to him. Trustee died before the action was commenced. The plt. claimed under the husband's will, made Aug. 11, 1785, duly proved. As to the slaves conveyed in trust for the wife's heirs, the plt. claimed on the ground her husband was her heir or distributee on the laws of Virginia, though he did not administer. Def't. claimed on the ground the legal estate was in the trustee, John Brock, and his heirs, and hence the plt. could not recover at law. But Tucker J. thought the *cestui que use* of a slave can recover him from any person taking him from the *cestui que use*, in *detinue*, &c. By this act it is enacted, that any slaves settled, conveyed, or devised, with the same limitations, and in the same deed or will with land, shall be considered as annexed to, and shall descend and pass with it, from time to time, in possession, remainder, or reversion ; with a proviso, that such slaves should be liable for any debts of the tenant in *tail* for the time being. And Tucker J. further held, that these slaves being settled with the land, the executor or administrator of B. Robinson could not recover them ; even if his, they went to his heirs, his will of 1785 being so far revoked by his said deed of 1788 : also, that the husband's marital rights extend to every personal thing of which his wife was possessed, or he possesses himself during the coverture ; and, in the event of surviving her, his right to administer on her personal property not reduced into possession supersedes all others ; and the law protects him from distributing it when recovered. But, he adds, in this case, he has given up this right by the settlement ; and the wife, as to the slaves reserved to her heirs, must be viewed as a *feme sole*. As her heir, he has no claim, but under the Virginia statutes, in the single case, her having no relations,—not this case ; he is in no sense next of kin to her. After the settlement he possessed not the slaves as husband, but as *cestui que use* under it. So no right passed from him, as hus-

CH. 223.  
Art. 11.

court to  
the Supreme  
Court of Ap-  
peals. Cases  
cited,—Willes  
327.—2 Ch.  
Ca. 68, 78.—  
1 Fonbl. 443,  
103, 313.—  
1 Wils. 169.—  
2 Vent. 350.—  
1 Ch. Ca. 265.—  
Cowp. 43, &c.  
—7 Bac. Abr.  
186.—Act of  
Virginia of  
1727, c. 4, s.  
12.—2 Call,  
447, 491.—  
*Detinue* for  
slaves,  
1 Hen. & M.  
374, 377, 450,  
463, Murrell  
v Johnson's  
adm'r.—  
Shermer v.  
Shermer, 1  
Wash. 266.—  
3 Ves. jr.  
244, Watt v.  
Watt. See Ch.  
129, a. 3, s. 7 ;  
Ch. 128, a. 2, s.  
8, and espe-  
cially Doe v.  
Knott, Ch.  
114, a. 16, cited  
1 Fonbl. 146,  
148, 256, 302,  
304.—  
1 Bac. Abr.  
480.—Dyer  
29.—1 Salk.  
113.—7D. &  
E. 125.—Ken-  
non v. Mc  
Roberts, 1  
Wash. 162.—  
1 Hen. & M.  
235, 239,  
Henderson v.  
Allens.

Ch. 223. band, to the plt. ; and a trust estate and a legal estate cannot be united, as decided, *Roy v. Garnett*, 2 Wash. 9. Roane J. agreed in the principles, except as to the *cestui que use*, recovering from his trustee—and cited *Goodtitle v. Knott*, stated,—and as to the application of the act of 1727, and a *venire facias de novo* to find if the plt. was sole heir of his testator, and of what descent some slaves were. Fleming J. generally concurred in the essential points. Lyon J. had doubts,—thought chattels limited to the wife and her heirs, on principles of law, go to her administrator ; that on her death, without child, or appointment, the trust ended. This case is thus largely stated, because several important points as to marriage settlements made after marriage, in execution of agreements made before ; as to trusts ; as to marital rights ; and as to *feme soles* rights in trust estates, are seen in this case ; and because in these respects the case shews law and equity in Virginia are the same, generally, as in England and in our States generally. And, therefore, we find counsel and judges, generally, relied on English authorities on all these points. If a slave be brought into Virginia, he is not entitled to freedom under her act of 1792, unless detained by compulsion and against law ; and a special verdict must find the facts expressly, and submit the law thereon to the court. A *parol* promise by a father to his daughter's husband before marriage, is a sufficient consideration to sustain a written agreement made after the marriage, if that be otherwise valid under the statute of frauds. Also, if the marriage be had at the request of the father. 2. Under certain circumstances a written instrument may be a good bond, though the obligor signs his name only between the penal part and condition, and that collateral, and the obligee's is signed at the foot of the condition, with the seal annexed, both signatures being attested by the same witness. 3. A mistake in one writing referring to another, by that may be corrected in a court of equity. 4. What constitutes a purchaser with notice. 5. Husband and wife sue in her right for a title to land : the conveyance must be decreed to her only. *Argenbright v. Campbell* and wife, 3 Hen. & Mun. 144 to 199. See *Eppes v. Randolph*, 2 Call, 185 ; *Cro. Car.* 408, *Townsend v. Kent* ; *Emperor v. Rolfe*, 1 Ves. 208 ; *Cholmondeley v. Meyrick*, 3 Bro. Ch. Ca. 252 ; *Legh v. Haverfield*, 5 Ves. jun. 452 ; *Willis v. Willis*, 3 Ves. jun. 51 ; *Colman v. Sarrel*, 1 Ves. jun. 50, 56 ; *Moore v. Edwards*, 3 Ves. jun. 38 ; *Bowers v. Cator*, 4 Ves. jun. 91.—*Tabb v. Archer & al.* 3 Hen. & M. 399, 435. Marriage articles, in their nature executory, are viewed only as heads or minutes of an agreement made on valuable consideration, (the marriage,) and may be moulded in equity according to the parties' intentions at the

time of agreeing to them. 2. The children are purchasers under both parents ; yet, on their deaths, take as *coparceners per stirpes*. 3. The parents cannot rescind marriage articles ; they may be enforced in equity, at the suit of the issue, or by any other persons for whose benefit made. If no trustee named in them, the court can appoint them. 4. The parties' intentions must be collected from their writings ; and parol evidence is admitted on general principles. 5. Husband and wife after marriage cannot vary or explain the articles by their endorsement on them. 6. Minors may be bound by them. 7. The parties to such articles being considered as purchasers have their rights all secured accordingly.

CH. 223.  
Art. 11.

§ 41. *Construction of Virginia statutes as to estates in tail.*

Mrs. Smith was the widow and administratrix of W. Carr jun. her former husband, and claimed dower in his estate, which was very large, and much entangled. The great question was, if Carr had a fee tail, or an estate for life only : 1. Independently of the Virginia acts of 1776 docking intails, and the acts of 1785, dispensing with words of inheritance to pass a fee : 2. As affected by those acts. As a case at common law numerous cases were cited, both sides, mostly cited in this work, especially in Ch. 129, 130 ; the *substratum* of all which, Judge Roane observed, was Shelly's case. The important part of this case filling sixty-two close pages, was the effect, the court held the said statutes had on the common law ; and said in substance, in construing wills made since those statutes were enacted on the subject of estates tail, the courts in Virginia will not, by implication, turn an express estate for life with limitations over in remainder into a fee tail, (as in like cases in England,) because what is done there to give effect to the testator's intentions would, if done in Virginia, defeat them, under the operation of her laws. In a late case in Massachusetts, *Hulburt v. Emerson*, this same ground was taken by the counsel for the debt ; that is, that it is the very spirit of the English system to encourage estates in tail, whereas it is the spirit of the American system to discourage them. 16 Mass. Reports, 241.

1 Hen. & M. 240, 302, Smith & ux. v. Chapman & al. in Chancery. Gleason's heirs v. Scott & al. 3. Hen. & M. 278.—Tenant in tail before 1776, could convey a base fee voidable only by the issue in tail. See c. 228, a. 8, s. 8.

An estate in tail created by will was, by the statute of 1776, converted into a fee simple, and the statute for docking estates in tail. Testator devised, in 1784, lands and slaves, &c. to his son, James Fisher, and his heirs, "and if my son, J. F. should die without lawful heir," then over &c. ; held to be a fee tail at common law. Decided by *Hill v. Burrough*, and *Tate v. Tally*.

Eldridge & al. v. Fisher, 1 Hen. & M. 559.

§ 42. Held the State is not compellable to make good the loss of tobacco, received, inspected, and passed at a public warehouse, but not delivered by the inspectors, when applied for

Commonwealth v. Colquhoun & al. 2 Hen. Code, 136 &c.

& M. 213, 245,—1 Rev.



CH. 223. by the persons holding the notes, though the inspectors, unlawfully, converted the same tobacco to their own use, and are insolvent, or otherwise the tobacco is missing and not accounted for. Stat. 1 Rev. Cod. 266. The persons injured sued the inspectors and recovered judgments,—then filed a bill, stating the case in the then late high Court of Chancery, against the Auditor, Attorney General, and Treasurer, praying for such relief as equity might direct ; to which bill the depts. put in an answer and *demurrer*. The answer neither admitted nor denied the pl't's. allegations, but called for evidence &c. The *demurrer* absolutely denied the State's responsibility to make good the loss. The chancellor thought it liable, as it compelled its own citizens to deposit their tobacco in its warehouses, under the care of its own officers, and received a reward for keeping the tobacco ; but his decree on two arguments, at great length, was reversed above, and the bill was dismissed. This case depended on the construction of the statutes of Virginia for the inspection of tobacco, and relating to public warehouses. From the year 1730 there has been the same system with occasional amendments. The State recovers costs when the decision is in its favour, but pays none when against it. As to statute titles, lost, &c. by not paying taxes, see Ch. 178, a. 14, s. 39.

Moor's administrators v. Dawney & al. 3 Hen. & M. 127, 136.—

§ 43. By statute, 1 Rev. Cod. c. 92, in Virginia, when the possessor of a plantation dies, his executor or administrator has the possession for a time, to finish the crop, and in that time may have trespass *vi et armis* for breaking &c. the close, and after verdict the court will presume the trespass was in that period of time.

Claiborne & ux. v. Henderson, and Henderson v. Claiborne & ux. 3 Hen. & Mun. 322, 388.

§ 44. Before the Virginia statute of 1785, which took effect January 1, 1787, giving a widow dower of a trust estate, she was not dowable of an equitable estate. The new statute provision, 1 Rev. Cod. c. 90, is as follows :—"When any person, to whose use, or in trust for whose benefit, another is, or shall be seized of lands, tenements, or hereditaments, hath, or shall have such inheritance in the use or trust, as that if it had been a legal right, the husband or wife of such person, would thereof have been entitled to curtesy or dower, such husband or wife shall have and hold, and may, by the remedy proper in similar cases, recover curtesy or dower of such lands, tenements, or hereditaments." Judge Tucker, in this case, said, the statute of frauds and perjuries, 29 Ch. II. c. 3, never was in force in Virginia, nor the statute of enrolment, 27 H. VIII. c. 16 ; but otherwise as to the statute of uses, 27 H. VIII., this has ever been in force in Virginia ; and he adds, that "a bargain and sale of land in Virginia, for a valuable consideration, by *word* only, is, (unless there be some

act of the General Assembly to the contrary,) sufficient to pass the same; for at common law, such a bargain and sale, by word only, raised a use, and the statute of 27 H. VIII. c. 10, transferred the use into possession; not a possession in law only, but (in the words of Lord Bacon) a *seizin in fee*,—not a title to enter into lands, but an *actual estate*." Bacon's Law Tracts, 338. And Judge Tucker says, he finds no statute in Virginia to the contrary, till 1710, c. 13, (edition of 1733;) then by one it was enacted, "that no lands, tenements, or other hereditaments, shall pass, alter, or change, from one to another, whereby an estate of inheritance in fee simple, fee tail, general or special, or any estate for life or lives, or any greater or higher estate shall be made or take effect in any person or persons, or to any use thereof to be made by bargain and sale, lease and release, deed of settlement to uses, of feoffment, or other instrument, unless the same be made by writing, indented, sealed, and recorded in the records of the General Court, or of that county where the lands shall lie" &c. This act did not mention deeds poll, or terms for years. But in 1734, this act was amended in these respects, and for the greater security to creditors and purchasers, it was enacted, "that all bargains, sales, and other conveyances whatsoever, of lands, tenements, and hereditaments, whether they be made for passing any estate of freehold or inheritance, or for term of years, and all deeds of settlement upon marriage, wherein either lands, slaves, money, or personal thing shall be settled, or covenanted to be left or paid at the death of the party, or otherwise, and all deeds of trust whatsoever shall be void, as to all creditors and subsequent purchasers, unless they be acknowledged or proved, and recorded, according to the directions of the said act; but the same as between the parties, shall, notwithstanding, be valid and binding." In the year 1748, these two acts of 1710 and 1734 were consolidated in one act, which made deeds &c. binding, not only "as between the parties," but their heirs also. *Minnis, exr. v. Aylett*, 1 Wash. 302; *Boswell v. Jones*, 1 Wash. 322; *Dawes v. Ferrers*, 2 P. W. 4; *Dormer v. Parkhurst*, 3 Atk. 1; *Colt v. Colt*,—was decided in 1662, and that a woman could not be endowed of a trust estate, nor of an equity of redemption, being a trust estate. *Swanwich v. Lifford*, or *Hill v. Adams*, 2 Atk. 208, A. D. 1741. So *Lady Radnor v. Vandebendy*, Show. Cases in Parl. 69; *Ambrose v. Ambrose*, 1 P. W. 321, A. D. 1717; *Mills or Mitchell v. Reynolds*. From all these, and many other cases, it is clear that there is no dower in a trust estate on the principle of our English common law; that is, the common law of England, as it was when the United States separated and became independent. That is the

CH. 223.

Art. 11.

Act, A. D.

1710, c. 13.

Act, A. D.

1734, c. 6;

no dower in

the estate of

*cestui que**trust*.—See

Ch 130, a.

4; especial-

ly a. 1, s. 15.

See also

*Godwin v.**Winsmore*,

2 Atk. 525.—

*Casborn v.**Ingis*, 1 Atk.603.—*Wallis**v. Taliaferro*,

2 Call, 489.

CH. 223.

Art. 11.

Art. 36.

point of time to which our inquiries must have relation. We have no concern in any municipal law since brought into existence in England. The constitution of New York declares "that such parts of the common law of England, and the statute law of England and Great Britain, and the acts of the legislature of the Colony of New York, as together did form the law of the said Colony on the 19th day of April, 1775, shall be, and continue the law of this State, subject" to be altered &c. by the legislature. This, in substance, was the understanding of every State in the Union; and some others, as Massachusetts &c., expressed it in their constitutions. Therefore, this English law, adopted here, remained in full force, and still remains in full force, so far as it is not altered by our constitutions and statutes. I am led to make these remarks, from observing some of our courts seem quite to forget that such law exists; especially in allowing dower in trust estates, where there is, or has been not any statute to authorize it. See also Ch. 112, Equity of Redemption, as to dower therein; Ch. 130, a. 4; especially Ch. 92, 93.

Beasley v.  
Owen, 3  
Hen. & M.  
449.—1 Rev.  
Code, c. 10.

§ 45. *Construction of the Virginia statute of frauds as to loans.* There is no clause as to loans in the 29 Ch. II. which statute never was adopted in Virginia. And the first statute of frauds enacted there, was in 1785, and took effect January 1, 1787. In this the clause as to loans was thus, "when any loan of goods and chattels shall be pretended to have been made to any person, with whom, or those claiming under him, possession shall have remained, by the space of five years, without demand made and pursued by due process of law, on the part of the pretended lender, or when any reservation or limitation shall be pretended to have been made, of a use or property, by way of condition, reversion, remainder, or otherwise, in goods or chattels, the possession whereof shall have remained in another, as aforesaid, the same shall be taken, as to creditors and purchasers of the persons aforesaid, so remaining in possession, to be fraudulent within this act, and that the absolute property is with the possession; unless such loan, reservation, or limitation, of use or property were declared by will or by deed, in writing, proved and recorded, as aforesaid;" that is, if it include lands, as conveyances of lands;—if personal estate only, by two witnesses. See above. Case in 1789: W. Hunt, by his will, gave a slave, then in possession of his son-in-law, W. Beasley, to Beasley's two sons, then minors, when they should come of age. In 1792, Hunt *verbally* lent this slave to Beasley, to aid him in supporting his children, reserving a right to take back the slave, as Hunt should think proper. In 1796 he died, and his will was recorded in that year, within five years

from the loan; one minor son died before the testator, and the other became of age in 1801. In 1801, the slave remaining with Beasley, was taken in execution for his debt to Owen, the appellee, and publicly sold. Judgment for the minor son. And held, that recording the will in 1796, was a good declaration within said act. In this case Judge Roane said, that in *Claiborne v. Hill*, 1 Wash. 177, it had been held, in cases of mortgages of slaves, a delivery of possession to the mortgagee is supplied by recording the mortgage deed.

CH. 223.  
Art. 11.

§ 46. *An individual's lands taken by statute for public use*,—remedy in chancery, and *ad quod damnum*. Dr. Turpin filed his bill in chancery against the Attorney General, on the statute of December 13, 1792, stating the directors of the public buildings, appointed by a statute passed in 1779, for removing the seat of government to Richmond, did, by the powers vested in them, some time in 1783, lay off about thirty acres of his land for public use, and caused it to be valued by a jury &c. The object of Dr. Turpin's bill was to obtain from the State some compensation on account of this land, and a restoration of a part of it. The bill called on the Attorney General to answer, but not as usual on oath. He filed a plea, demurrer, and answer. The plea stated that on a certain course taken, by consent, the title had been decided against Dr. Turpin, as to the part he claimed to have restored. The demurrer urged his remedy was strictly a legal one. The answer denied his principal facts. The principles settled were: 1. The answer not on oath was well enough: 2. The act of 1792 extends to any demand a citizen has against the State in law and equity: 3. That the legal issuing and execution of the writ, *ad quod damnum*, in such case, immediately divests the title of the owner, and vests it in the State, and he becomes entitled only to valuation money, and damages assessed by the jury: 4. There is no interest thereon unless he applies to the auditor for his warrant, and is refused, or otherwise is denied payment. Some incidental matters were also decided,—as that the bill might be viewed as a petition &c.

Attorney General for the State v. Turpin.—The writ, *ad quod damnum*, was once much used in England, *Bohun* 10 to 26.—F. N. B. 226 &c.

§ 47. *How jointure bars dower on the statutes of Virginia*. Action for dower *unde nihil habet*; held, 1. On the Virginia act of December 6, 1792, s. 11, 1 Rev. Code, p. 171, any estate conveyed by deed or will for a wife's jointure, in lieu of dower, though not so expressed, may be averred to have been so intended, and parol or other evidence *dehors* the deed or will is admissible, as to the relative situation of the parties, and circumstances of the testator, from which such intention may be inferred: 2. In pleading it is necessary to state only so much of the substance of the will as relates to the point in

*Ambler & ux. v. Norton*, 4 Hen. & M. 23 to 56.

As to facts *dehors* the will, see Ch. 130, a 4, s. 88, 90; as to stating so much of the will &c. 90.

CH. 223. issue : 3. If in pleading a jointure in bar of dower, the deft. fails to the husband, being seized in fee of the premises, made the jointure, it is but defect in form. Nor need the deft. state the jointure was to take effect in possession, immediately on the husband's death : 4. A jointure may be a valid bar of dower, though subject to incumbrances by judgments, statutes, mortgages, or bonds, as the widow, if evicted thereof, has dower : 5. If both personal and real estate be devised to her, the whole being averred to be in lieu of dower, by entering on the real, she shews her election to take the jointure, and the plea need not state she received the personal estate also : 6. It is enough it appears in the case, in what county the jointure-land lies. This was decided principally on the word, *avermment*, in the Virginia act, not found in the 27 of Hen. VIII. c. 10. The act is thus—"Also, if any estate be conveyed by deed or will, either expressly or by averment, for the jointure of the wife, in lieu of her dower, to take effect in her own possession, immediately on the death of her husband, and to continue during her life, at the least, determinable by such acts only, as would forfeit her dower at the common law, such conveyance shall bar her dower of the residue of the lands, tenements, and hereditaments, which, at any time, were her said husband's." Sect. 12 provides, that when any estate intended to be in lieu of dower, shall, through any defect, fail to be a legal bar thereto, and the widow shall demand dower also, the estate limited to her *with intention* to bar her dower, shall thereupon cease. This provision is not, nor is the word, *wills*, in the 27 Hen. VIII. as to jointures. On the whole, it is very clear the appellants failed, by not demurring *specially* to more defects in the appellee's special plea, pleading a jointure in bar of dower. This case was decided as above, first in the District Court of —, and then in the Court of Appeals, by two judges against one.

Nimmo's ex.  
v. The Com-  
monwealth.

§ 48. *Construction of statutes in Virginia as to State exemptions &c.* In April, 1786, the State recovered a judgment in the General Court against Nimmo's testator. In 1799, that court issued a *scire facias* against the executor, to revive the said judgment; who appeared and pleaded "payment by the testator, and fully administered," to which the Attorney General replied generally. Jury found against the payment, and found assets unadministered, \$263.18, (as much as the debt,)—was a bill of exceptions to certain opinions of the court &c.;—the judgment was, that the Commonwealth have execution against the deft for the amount of the former judgment *de bonis testatoris*, if so much &c.; if not, *de bonis propriis*. The deft. obtained a *superseas* from a judge of the Court of Appeals; and in his po-

See Kemp v.  
Common-  
wealth, 1  
Hen. & Mun.  
85.—Birch v.  
Alexander,  
1 Wash. 34.  
—Turner v.  
Turner, 1  
Wash. 139.

tion assigned seven errors, out of which arose four material questions. 1. Was the State bound by the statute of limitations. The court held it was not, and relied on a clause in the act of Assembly of 1778, c. 2, enacting, that "no time shall bar the Commonwealth of execution,"—not repealed by the act of 1792.

CH. 223.  
Art. 11.

2d. Was the executor bound at his peril to take notice of the said judgment against his testator. Held, he was, as it was a judgment of the General Court. Toller, 210, 211. But the court doubted if executors and administrators are bound at their peril to take notice of all judgments against their testators and intestates in the two hundred and more local courts in Virginia. 3. Question, could the executor be allowed for his trouble and expenses any thing beyond funeral charges? The lower court held he could not, but the Court of Appeals held, he was entitled in the words of the statute to be allowed, "all his reasonable disbursements and charges" made for the benefit of the estate he represented, and a reasonable recompense for his personal trouble, in preference to the claim of any creditor of the deceased, as the State taxes on his property, expenses of recovering a runaway slave whose value was credited to the estate, slave hire in making up the crop by the executor on the deceased's land, the proceeds of such crop being credited to his estate. 4. Was the executor bound to pay the said judgment to the State, *de bonis propriis*, having applied the assets to paying specialty and simple contract debts, and such charges and disbursements? Held, he was, and the court adopted, in substance, the English grades of debts, as debts on judgments and records are first to be paid, next specialty debts; and lastly and the most inferior simple contract debts. Opinions were given by two of the judges on other points not necessary to be decided; one was, that the court observes these grades in applying legal assets, not equitable assets, but distributes these in *pari passu* on the principle of equality. Eppes v. Randolph, 2 Call, 187. It seems in Virginia that monies arising from the sale of lands the testator in his will directs to be sold to pay his debts, are but equitable assets.

Elliot v. Lyell, 3 Call, 268.—Cro. El. 793, Littleton v. Hibbins.—Ordway v. Godfrey, Cro El. 575.—Herbert's case, 3 P. W. 117.

Mayo v. Bently, Eppes v. Randolph, 2 Call, 126.

Lowthian v. Hasel, 4 Bro. C. 171.

*What proves the plea plene administravit.* Held, the account of the administration of the administrators on the estate made before commissioners appointed by the probate court, (county court) and there examined, allowed, and admitted to record, is proper evidence on the issue of *plene administravit*, *prima facie*, though copies of the inventory and appraisement are not exhibited with the account settled; they are by law required to be made and returned to the court, there to remain for the inspection of creditors and others, and need not

Atwell's admrs. v. Milton, 4 Hen. & M. 253.

CH. 223. be so exhibited, unless some errors be shewn to falsify the account.  
 Art. 12.



ART. 12. *North Carolina statutes*, respecting conveyances by deeds, acknowledged or proved and recorded ; as to examining wives privily ; as to wills, executors, and administrators ; as to devises being void as against creditors, are nearly the same as in Virginia : except however,

§ 1. Executors and administrators must be sued in two and three years, with the usual saving for minors &c. ; and the proceedings against heirs liable for the debts of the intestate are in chancery.

§ 2. Administration is granted to the widow and next of kin, and then to the largest creditor &c.

§ 3. The common law principles as to seizin are not enacted into statute law.

§ 4. North Carolina, and Tennessee settled under her laws, seems in her original settlements to have rather followed the Virginia plan, at least to have adopted the leading principle of that plan, which generally allowed individuals to pick and choose, lot out, and locate new lands for themselves ; the consequence has been, disputes more numerous about boundaries and original locations of lands in Tennessee alone have found their way into the Supreme Court of the United States, than all the disputes on similar subjects in all the States east of the Delaware and northwest of the Ohio.

§ 5. In this case are cited several acts shewing that deeds of lands in North Carolina and Tennessee, acknowledged or proved in a prescribed manner and recorded, are essential to the conveyance of lands, and have been so since 1715 : 2. By the laws of North Carolina any citizen was allowed to enter with the entry-taker any quantity of land not exceeding 5,000 acres specifically described by him ; after three months the entry-taker gave him a copy of the entry with a warrant to the surveyor to survey the land : 3. It appears titles to lands in these States are tried in ejectment on the English principles, and there, as in England, the date of the demise in the declaration may be amended during the trial so as to conform to the title.

§ 6. The acts of North Carolina of 1783 and 1784, opening land-offices, allowed an individual in different ways by different entries &c. to purchase more than 5000 acres. A patent is not vacated by obliterating the consideration. The State court's construction of their State statutes is to be respected in Federal courts. In Tennessee the younger patent on the elder entry prevails against the elder patent on the younger entry. A patent is void if no previous entry ;—so if the State had no title. But a patent supposes all prior requisites existed.

7 Cranch, 471, Blackwell v. Patton.

9 Cranch, 87, Polk's lessee v. Wendal & al.  
 See more of evidence in these cases, 5 Wheaton, 293.

Though North Carolina ceded lands to the United States, she could complete a title to parts thereof incipient before the cession. Other cases carried to the Supreme Court of the United States from these States involving their land titles, see sundry cases in Cranch's Reports, and especially vols. 7, 8, 9; and Wheaton's Reports 1, 2, 3, 4. See art. 17, s. 3.

CH. 223.

Art. 13.

ART. 13. *South Carolina statutes*, respecting conveyances by deeds, acknowledged or proved and recorded; and those executed by married women; also, respecting wills, executors, and administrators; so as to frauds and uses, see Virginia. So as to crops and slaves.

§ 1. But there must be three or four credible witnesses to a will.

§ 2. If a person take up money on a mortgage where there is a judgment against him without giving notice of it, loses his or her equity of redemption. So if he take up money a second time and mortgage the same thing without notice, the same rule is observed.

§ 3. Sundry common law principles as to dower and jointures are enacted into statute law. See Dower and Jointures.

§ 4. One may devise according to the 29 of Ch. II. c. 3, (statute of frauds and perjuries.)

Widows may bequeath crops standing on their dower, and other lands planted for their use. And so a parson the crop on his glebe.

§ 5. Ordinaries in some cases grant probates of wills and letters of administration.

§ 6. A will of real and personal estate both, void as to the real, is so as to the personal estate, as in Massachusetts; and it is declared that marriage and issue had after a will is made, is a revocation of it.

§ 7. Inventories are made by three or more freeholders, and if the goods be in several counties, appraisers are appointed in each, but the inventory is recorded where administration is granted. The appraisement is not conclusive as to the value.

§ 8. If the widow marry, the court, ordinary, or county court, may revoke administration as to her, or join some of the kin with her.

§ 9. If an executor or administrator take security insufficient when taken, he is liable to make good the debt &c.

§ 10. Probate bonds are made payable to the ordinary, or to the justices of the court and their successors, and recorded in the clerk's office.

§ 11. Clerks and ordinaries are directed yearly to make returns of probates and administrations into the office of the secretary of the state, with the dates, names of testators and



**CH. 223.** intestates, of executors and administrators, of the sureties and the penalty of the bond there to be filed.

**Art. 14.**



§ 12. In paying debts of the deceased by his executors or administrators, several classes, priorities and preferences are established by law. They are to account annually.

§ 13. Executors of their own wrong are declared to be trespassers, and liable and allowed as at common law, and one is such executor who fraudulently takes administration.

§ 14. The right of primogeniture abolished, and the estates of intestates are equally divided among the heirs; but the widow takes her third in fee,—so her moiety. But if no lineal descendants, father or mother, the widow has half, and brothers and sisters, or brother and sister of the whole blood, half, as tenants in common.

§ 15. If no lineal descendants, parents, brother, or sister of the whole blood, but a widow and a brother or sister of the half blood, or a child or children of a brother or sister of the whole blood, the widow has half, and the other half goes to brothers and sisters of the half blood, and to the children of the brothers and sisters of the whole blood equally.

§ 16. If none of the above relations, the widow has a moiety and the lineal ancestor or ancestors more remote than father and mother, the other moiety; and if there be none of these above said relations, the widow has two thirds, and the next of kin one third, computing by the rules of the civil law. The personal estate is divided in the same manner as the real estate is. Advancements to children are on the general principle.

§ 17. It is declared that estates in joint-tenancy are severed by the death of a joint-tenant, and must be distributed as estates held in common. Partition is made on a petition for partition.

**ART. 14.** *Georgia statutes* on the subjects of this chapter, are on the general American principles already stated; and afford but few variations from them, that need be noticed here. Some few, however, merit a little attention:—As

§ 1. Executors and administrators neglecting their duty, are made chargeable as executors of their own wrong by the common law are chargeable.

§ 2. Real and personal estates are viewed as of the same nature, and distributed accordingly, equally; and admitting the whole and half blood.

§ 3. The register of probate, in each county, proves wills and grants letters of administration; all questions as to which may be decided finally in the Superior Court in each county, on principles of law and equity.

§ 4. Executors and administrators are empowered to con-

vey lands, tenements, and hereditaments, which their testators and intestates respectively contracted in *writing* to sell and convey, if the heirs do not dissent thereto.

CH. 223.  
Art. 15.

§ 5. Executors and administrators are held by these statutes to account annually, on oath, with the register of probate; their bonds being to him and his successor.

§ 6. The register of probate is declared liable, if these bonds be insufficient, when taken; and not by reason of any after accidents or failures.

§ 7. Sureties, in probate bonds, may require such counter-security and indemnity, as the Probate Courts see fit to direct.

§ 8. Creditors must demand their payments in twelve months, of executors and administrators.

§ 9. The liability of the lands of a deceased debtor, in equity, for the payment of his debts, without making his heir a party to the suit, has been held in the Supreme Court of the United States. See the case of *Telfair & al. v. Stead* in chapter 226, a. 15; see Ch. 194, a. 2, s. 31.

Construction of the act of limitations as to lands, Ch. 179, a. 19, s. 28.

§ 10. Title to lands in Georgia under a statute passed January 7, 1795, by the legislature thereof, alleged to be obtained by the persons proposing to purchase said lands, by bribing some of the members of said legislature, and which persons did purchase, and which statute was repealed February 13, 1796, by another statute, the reason for passing which was alleged in it to be the said undue influence,—the legal effects of these acts, see *Fletcher v. Peck*, Ch. 108, a. 3, s. 19; and Ch. 196, a. 8, s. 22. By the second the said first act was declared null and void, and so all titles under it.

6 Cranch, 87  
to 140,  
*Fletcher v.*  
*Peck*.

§ 11. By the statutes of Georgia, a deed is valid, if recorded in twelve months; but any deed recorded within ten days after its execution, takes preference of deeds not recorded within that time, or previously on record.

7 Cranch, 50.  
—See Ch.  
226, a. 8, s.  
7.

ART. 15. *Kentucky statutes* on these subjects of deeds and conveyances, wills, descents, distributions, and settlements of estates, are generally framed on the common American principles, and especially those of Virginia. Some matters, however, merit a little attention, as being deviations from those principles:—As

§ 1. The statutes of Kentucky authorize aliens to hold real estates there.

§ 2. In the year 1779, the legislature of Virginia, then including Kentucky, passed an important act for disposing of the waste or unappropriated lands in that State, south of the Ohio;—and to any person who would pay to the State £40

1 Cranch, 44,  
102, *Wilson*  
*v. Mason* in  
error from  
District  
Court of  
Kentucky.

CH. 223.  
Art. 15.



for each 100 acres; and on his so paying, directed a land warrant to be issued to him for the quantity so paid for;—appointed books of entries in each county, in which the purchaser, having made his pitch or location, should accurately enter it with date &c. This book was open to the inspection of all, and established a public record, in order that after purchasers of the adjoining *residuum*, might know what lands had been so granted. The act also appointed a chief surveyor in each county, and deputies, to survey the several locations so entered. In April 1780, Mason thus located, and entered in this book a tract of 8,300 acres. In October, 1780, he removed his location, and surveyed a different tract. Held, he had no title to the tract surveyed; as unappropriated lands in Kentucky &c. could not then be legally appropriated by survey alone, without a previous legal entry in said book of entries, and there was no such entry of the tract surveyed, but the entry was of another tract. Each party entered a *caveat* against a grant being made out to the other. The main argument in favour of Mason was, that by his survey, he did not remove, but only explained his location. Wilson knew of Mason's survey in October, and he urged Wilson's surveying &c. the same land was a fraud; but the court held it was not; for when Wilson had notice of the survey, and Mason's supposed title under it, he, Wilson, knew was void; and it is no fraud for A to buy lands he knows B claims, if B has no title at all to them. Error lies on a *caveat* from the District Court of Kentucky to the Supreme Court of the United States. *Caveats* are at the common law.

4 Cranch, 172, Marshall & al. v. Currie; see cases in Sneed's R. 390; at or near means at *prima facie*, Id. 120.

§ 3. Error from the District Court of Kentucky in a suit in Chancery, in which the plts. in error were the original complainants. The bill stated the deft. had obtained an elder *patent* for land, covered by the plts. elder *entry*. Held, *vague expressions* in an entry, in this State, may be rendered sufficiently certain, by reference to natural objects stated in the entry, and by comparing the courses and distances of the lines with those natural objects. The court confessedly made allowances for the laxity of titles acquired in Kentucky under the land laws of Virginia; and decreed a conveyance to be executed by the deft. to the plt. of the land so covered, and each party to pay his own costs.

5 Cranch, 191, 234, Bodley & al. v. Taylor in error.

4th. It is a good ground of equitable jurisdiction, that the deft. has obtained a prior patent of land, so a legal title to which the plt. had the better right in equity, under a prior entry duly made. And in exercising this equitable power, the court will proceed in conformity to the established principles of a Court of Chancery. If an entry of land in the land office bound it on a road so many miles, these are to be computed

not on a straight line, but by the meanders of the road. If one have so many acres, say 400, and the form is not prescribed, the Kentucky rule is, he must locate it in the form of a square. A deft. in equity, who has obtained a patent of land not included in his entry in the land office, but is covered by the complainant's entry in it, will be decreed to convey it to him; but he will not be decreed to convey to the deft. lands the plt. has got a patent of, which the deft. included in his entry, but by mistake not in his survey. The Supreme Court of the United States will comply with a principle really settled in a State in a manner different from what this court would deem correct. "It is impossible to say how many titles might be shaken by shaking the principle." "The very extraordinary state of land titles in Kentucky has compelled the judges there, in a series of decisions, to rear up an artificial pile, from which no piece can be taken by hands not intimately acquainted with the building, without endangering the structure, and producing a mischief to those holding under it, the extent of which may not be perceived."

CH. 223.  
Art. 15.

Cited  
Hughes' R.  
14, 15, 110,  
124, 181 —  
Sneed's R.  
19.—1 Wash.  
116, 230.—2  
Wash. 48.—  
Sneed's R.  
43, 46, 47, &c.

§ 5. Also in chancery, held, 1. The first survey under a Virginia military land warrant, gives the prior equity; the survey is the act of appropriation: 2. The certificate of survey proves it was in the surveyor's hands: 3. The law requiring every survey to be recorded in two months after made, is merely directory to the surveyor, and the survey is valid, though he neglect it: 4. The principal surveyor may make out the plot and certificate from the notes of the deputy surveyor: 5. If A locate land, and afterwards B locate the same, without notice of A's location, B cannot protect his title, by getting the elder patent: 6. A survey is not void because it contains more land than is in the warrant: 7. The patent relates to the inception of the title; hence he who first has appropriated the land, has, in Chancery, the best title: 8. The locator of a warrant undertakes himself to find waste and unappropriated lands, and his patent issues on his own information to the government, and at his own risk;—is not viewed as a purchaser without notice: 9. The equity of the prior locator extends to the surplus land surveyed, as well as that stated in the warrant. Decree of the District Court reversed, and the deft. decreed to release to the plts. respectively the lands within his patent; which lie within the lines of the lands conveyed by — to them respectively.

5 Cranch,  
234, Taylor  
& al. v.  
Brown, in  
error,—for  
services  
prior to 1763.

§ 6. As to the peculiar kind of titles to land in Kentucky, arising out of the Virginia land law of 1779, and the practice on it, see Bibb's Reports of Cases in the Court of Appeals of Kentucky. This author says, and truly, the rules of landed property in Kentucky are, in an eminent degree, the creatures

1 Wheaton's  
R. 490.

СН. 223. of a court,—a species of judicial legislation. This will readily  
 Art. 15. be seen in the few Kentucky cases cited in this work. How  
 ~~~~~ extremely vague and uncertain must the statute law of an  
 extensive territory be, when the courts of law find themselves  
 absolutely obliged to adopt this judicial legislation, in order to  
 settle the numerous disputes which arise in regard to the bound-  
 aries and titles to lands ;—a confusion that has arisen mainly  
 from adopting the erroneous principle in settling a new coun-  
 try, which allows individuals to pick and choose, lot out, and  
 locate lands for themselves, as interest, fancy, or fraud, may  
 direct, and where there are no previous surveys, plans, loca-  
 tions, or lottings made by the government. The New Eng-  
 land plan has ever been the reverse of this ;—this, usually,  
 has been for the government first to cause new lands to be  
 surveyed, and laid out into townships, about six miles square  
 each, and each township to be divided into lots of about 100  
 acres each, bounded by marked trees, or other visible and  
 actual boundaries ; and each township and lot properly num-  
 bered ; then to offer them to be drawn or sold according to  
 such plans, regularly made and returned, preserved, and re-  
 ferred to. The vast difference between these plans is seen in  
 practice. Kentucky has been settled as above stated, and  
 numerous have been the land actions that have even found  
 their way into the Supreme Court of the United States.  
 Whereas Vermont, settled in nearly the same period, but on  
 this New England plan, has scarcely, (if we except a *glebe*  
 lot disputed on the principles of the Episcopal church,) pro-  
 duced an action for that court.

§ 7. By the constitution of Kentucky established April 19,  
 1792, all laws which June 1, 1792, were in force in Virginia  
 and of a general nature, and not local to her only, and not re-  
 pugnant to the said constitution, nor to the laws enacted by  
 the legislature of Kentucky, were in force in Kentucky, and  
 remained so, until altered or repealed by her legislature.  
 Hence, her laws, like those of England, are : 1. The written  
 or statute law : and 2. The unwritten or common law. The  
 statute law is composed of the statutes of England, enact-  
 ed previous to the 4th of James I. (when Virginia was settled ;) the  
 statutes of Virginia in force April 19, 1792 ; and the  
 statutes of Kentucky ; and as before stated, Virginia in 1661,  
 adopted the English common law and statutes applicable to  
 her situation, enacted before the year 1608. Hence, that  
 law and those statutes are still in force in these two great  
 States, where not altered or repealed by Federal law, or by  
 the statutes or constitutions of these States. What parts of  
 that English law and statutes were applicable to Virginia in  
 1661, must often be a question to this day. The method

adopted by Carolina, stated in chapter 196, was much preferable.

CH. 223.  
Art. 15.

§ 8. Statute titles in Kentucky arising out of her revenue laws. By these acts all former revenue acts were reduced into one system. T. K. Laws, p. 61 to 77. By these laws lands may be sold for taxes;—by s. 17, first act, the State “has a perpetual lien on every tract of land for the taxes and interest due thereon, which cannot be affected by any alienation. The sheriff may levy what is due on any slaves, goods, or chattels, found thereon in the possession of any person, claiming under the proprietor from whom the same is due, for so much of the land as he has purchased. Tenants who may be obliged under this act to pay the tax on any land they have leased prior to their interest in the same, or on a greater part than they hold, can reclaim it from the owner, and have a *lien* on the land to secure the repayment, unless the case be provided for by special contract between the proprietor and tenant.” “Every person who is evicted from land on which he has paid the taxes, has a *lien* on the land for the same, and retains possession till he is reimbursed, unless the person recovering the land has also paid the taxes.” The taxes are laid on persons, (tithable) lands, horses, retail stores, riding carriages, and tavern licenses, writs, &c. laid and collected under appointments &c. of the county courts; each citizen gives in a list of his taxable persons and property on oath to a commissioner, who dooms him, if he fails to give in or gives in falsely, and he also forfeits \$10. The system is plain, except the titles to lands derived under it; these are complex, owing to the nature of such titles, and especially to such perpetual liens. The sheriffs (as in Virginia) collect the taxes.

Acts of Dec. 21, 1799, and Dec. 20, 1800.—Acts of March 1, 1797; Dec. 18, 1792; Feb. 18, 1798; Dec. 19, 1801.

§ 9. “A collection of the acts and parts of the acts of the Virginia Assembly concerning the titles of lands” in Kentucky, passed December 17, 1796. The first is the said Virginia act, passed 1779; another act of the same year “for establishing a land officer, and ascertaining the terms and manner of granting waste and unappropriated lands,” already sufficiently understood, (p. 86 to 112;) another act passed in 1779, giving further time to officers and soldiers to ascertain their claims to lands; another act of 1779, merely explanatory of acts and grants prior to 1779; an act passed in 1780, giving time &c.; three acts in 1781, amendatory, giving time &c.; two acts in 1783; five in 1784, of the same kind; two in 1785; two in 1786; one in 1787; two in 1788; one in 1789; three in 1790; and one in 1791, merely explanatory, giving time, making small additions &c. Here the legislation of Virginia terminated in Kentucky, and that of the new State commenced; and in 1792 the legislature passed several acts

Virginia statutes as to land titles in Ken. T. K. Laws, p. 86 to 137.—Acts of Ken. 137 to 167.

CH. 223. to give time and to amend the said Virginia land office act ;  
*Art. 15.* several in 1793 to the same purposes, as to treasury warrants  
 &c. So in 1794, 1795. In 1796, an act as to boundaries  
 was passed. In 1797, 1798, acts not important. The same  
 in 1799. Thus far there seems to have been nothing done  
 materially to vary Virginia titles in Kentucky, nor in 1800.

*Art Dec. 19,*  
 1796.

§ 10. *Conveyances* of estates of inheritance or freehold, or  
 years more than five in lands or tenements, must be by deed,  
 and must be acknowledged, or proved by three witnesses in  
 the office of the clerk of the Court of Appeals, or of a District,  
 Quarter Sessions, or County Court, &c. within eight months  
 after delivering &c., and be lodged with him to be recorded,  
 in order to be valid against a purchaser for a valuable con-  
 sideration, not having notice thereof or any creditor. So no  
 covenant or agreement made in consideration of marriage, is  
 good against such purchaser or any creditor, unless so acknow-  
 ledged or proved, (if land be charged) and recorded ; or if  
 only personal estate be settled or covenanted, or agreed to be  
 paid or settled, then to be proved before the Court of Quarter  
 Sessions or County Court of the county in which the covenantor  
 &c. lives, and so recorded, &c. Sect. 3 provided for acknow-  
 ledging or proving in the usual manner the deed of the grantor  
 &c. who lives in another State or country ; but it must be re-  
 corded, as above. The wife is privily examined &c as in  
 New York, Virginia, &c. but more minutely and particularly.  
 This examination and the proof of deeds executed out of the  
 State, and in counties in it in which the land does not lie,  
 occupy several pages, and proofs are required hardly to be  
 expected but from lawyers with the Kentucky act before them.  
 Sect. 10 provides that every estate in lands or slaves, which,  
 October 7, 1776, was an estate in fee tail, shall be deemed  
 from that time and forever a fee simple estate, and so all  
 estates whatever limited or to be limited in fee tail, are by the  
 act of 1796, turned into fee simple estates, and may be, and  
 have been disposable of accordingly. By sect. 11, every  
 estate conveyed or devised after December 19, 1796, is a fee  
 simple, " if a less estate be not limited by express words, or  
 do not appear to have been granted, conveyed, or devised by  
 construction or operation of law." And " where an estate  
 hath been, or shall be by any conveyance, limited in remain-  
 der to the son or daughter, or to the use of the son or daugh-  
 ter of any person, to be begotten, such son or daughter born  
 after the decease of his or her father, shall take the estate in  
 the same manner as if he or she had been born in the lifetime  
 of the father, although no estate shall have been conveyed to  
 support the contingent remainder after his death." Sect. 12.  
 " By deed of bargain and sale, or by deeds of lease and re-

lease, or by covenant to stand seized to use, or deed operating by way of covenant to stand seized to use, the possession of the bargainor, releasor, or covenantor, shall be deemed heretofore to have been, and hereafter to be transferred to the bargainee, releasee, or person entitled to the use of the estate or interest, which such person had or shall have in the use, as perfectly as if such bargainee, releasee, or person entitled to the use, had been enfeoffed with livery of seizin of the land intended to be conveyed by the said deed or covenant." Sect. 13. "Estates of every kind, holden or possessed in trust, shall be subject to like debts and charges of the persons to whose use or for whose benefit they were, or shall be respectively holden or possessed, as they would have been subject to if those persons had owned the like interest in the things holden or possessed, as they own or shall own in the uses or trusts thereof." Sect. 14, gives dower and curtesy in a use or trust interest, the same as in the estate itself. By sect. 15, "grants, or rents, or reversions, or remainders, shall be good and effectual without attornment of the tenants; but no tenant who before notice of the grant shall have paid the rent to the grantor, shall suffer any damages thereby." Sect. 16. "The attornment of the tenant to any stranger, shall be void, unless it be with the consent of the landlord of such tenant, or pursuant to, or in consequence of the judgment of a court of law, or by order or decree of the court of equity."

CH. 223.  
Art. 15.

§ 11. This act admits as duly proved all deeds, writings, and records, acknowledged, proved, or authenticated in other States and places than in Kentucky, when acknowledged, proved, or authenticated according to the laws of the State or place where so done, certified to be so by the judge, chief justice, or presiding magistrate or notary, as the case may be.

Kentucky  
Act of Feb.  
10, 1798.

§ 12. This act provides, that "all alienations and warranties of lands, tenements, and hereditaments, purporting to pass or assure a greater right or estate than the person making them can lawfully pass or assure, shall operate only as to so much of the right and estate in them, as such person can lawfully convey, but shall not pass or bar the residue of the said right or estate." By sect. 2, if there be an express warranty binding the heir, then where demandant, he is barred as at common law, as he has or shall have "any heritage" descending of the side of the alienor.

Kentucky  
Act, Jan. 16,  
1798.

§ 13. This is as to partition. Sect. 1 provides therefor by writ *de partitione facienda*, on the principles of the common law. Sect. 2 abolishes the principle of survivorship among joint-tenants. Sect. 3 makes the representative of a joint obligor &c. deceased liable, as they are in cases of joint and several contracts. Sect. 4 to 8 make special provision as to non-residents, minors, &c. pleas, allotments, &c.

Kentucky  
Act, Dec.  
19, 1796.



CH. 223. Another act of March 1, 1797, provides for conveying  
*Art. 15.* real estates contracted to be conveyed by persons deceased, and for making partition, nearly on the principles of the laws of Massachusetts before stated. There are many other statutes as to waste, aliens, frauds, elegits, and other executions levied &c., subjecting lands to the payment of debts &c., too long and numerous to be abridged in this work; and in fact a large part of what is intricate common law in some States, already noticed, has been in Kentucky enacted into statute law, and made more intricate, by mingling the penman's own ideas and words with those of the common law, in a manner to make many of the useful judicial constructions of that law in a degree useless; hence a part of the difficulties so loudly complained of in this State. Such statute law is often abridged, but to little purpose.

Kentucky  
 Act, Dec. 19,  
 1796.

§ 14. This act concerning dower and jointures, in substance, regulated them on the principles of the common law. By act of February 10, 1798, if the husband lose his wife's lands by default, she retains her right of entry after his death, and suit accordingly. By this act also, several parts of the common, were enacted into statute law.

Kentucky  
 Act as to De-  
 scents, Dec.  
 19, 1796.

§ 15. By this act, if one having an estate of inheritance die intestate as to it, it descends "in parcenary to his kindred, male and female:" 1. To his children and their descendants, if any: 2. If none such, then to his father: 3. If no father, then to his mother, brothers and sisters, and their descendants, or such of them as there be: 4. If a minor die without issue, and have estate of inheritance by purchase, or from his father by descent, the mother of such minor has no part of it, if there be living any brother or sister of such minor, or any brother or sister of the father, or any lineal descendant of either of them, saving to such mother any right of dower which she may claim in said real estate of inheritance: 5. "Where a minor dies without issue, having title to any real estate of inheritance, derived by purchase or descent from the mother, neither the father of such minor, nor any issue which he may have by any person other than the mother of such minor, shall succeed to, or enjoy the same or any part thereof, if there be living any brother or sister of such minor, or any brother or sister of the mother, or any lineal descent of either of them," saving to such father his tenancy by the curtesy, if any: 6. "If there be no mother, nor brother, nor sister, nor their descendants, then the inheritance shall be divided into two moieties, one of which shall go to the paternal, the other to the maternal kindred, in the following course, that is to say, first to the grandfather;" if none, to the grandmother, uncles and aunts, of the same side, and their descendants, or such of

them as there be ; if none such, then to the great grandfather &c. &c. in many minute provisions among relations too remote often to be heirs. Thus we see the same principle of equality in our States, but vast variety in minute detail. CH. 223.  
Art. 16.

ART. 16. *Louisiana.*

§ 1. When Louisiana was a territory, she adopted the late French Civil Code, with such variations as her situation required. This was published in one volume, 491 pages, in English in one page, and in French in the next, called a Digest of the Civil Law, divided into books ; books into titles ; titles into chapters ; chapters into sections ; and the subject matter of each is expressed ;—but each title is divided in articles that follow, 1 to 50, 1 to 100, &c. without regarding the chapters or sections, hence may well enough be cited by book, title, and article ; and the subdivision of the article.

A. D. 1808, March 31, the act was passed by the House of Representatives, Council, and Governor.

§ 2. "In matters of legal successions no difference of sex, and no right of primogeniture are known, but they are regulated by the most perfect equality ;" and by other articles as to the ascending, descending, and collateral lines or relations.

Book 3, title 1, art 17, page 148.

Art. 19. "Representation takes place *ad infinitum* in the direct descending line." Art. 21. "In the collateral line, a representative is admitted only in favour of the nephews and nieces coming to the succession of their uncles and aunts, in place of their fathers or mothers before deceased." Art. 22. They participate with brothers and sisters of the deceased ;—have a preference over brothers of the half blood, when they are children of a brother or sister of the whole blood, and over uncles and aunts of the deceased. From art. 1 to art. 259, in this first title, book 3, are numerous rules as to descents &c. of estates. The descent is *per capita*, when all are in equal degree ; art. 27 &c. *aliter per stirpes* or roots. If the deceased leave no descendants, his or her estate goes to his or her father and mother, or other ascendants, and if there be paternal and maternal ascendants, the paternal have half and the maternal half, though unequal in numbers ; and female ascendants inherit equally with male ascendants in the same degree. And there is no representation in the ascending line. Hence one alone, male or female, in the ascending line in a nearer degree, paternal or maternal side, excludes all other ascendants in a degree more remote, and in some cases the whole excludes the half blood. These are the general principles, but the detail can be correctly understood but by examining the said 259 articles. These laws are very complex as to natural children, who may, in certain specified cases, inherit or have alimony. And many classes of such are described. And see Ch. 147, s. 16, &c.

See much more law as to this State, as to liens, Ch. 44, a. 4, s. 1 to 25 ; as to pledges, Ch. 142, a. 9 to 17 ; as to legacies, Ch. 147, s. 9 to 21 ; as to bills, bailments, &c. Ch. 142 ; as to limitations and prescriptions, Ch. 161, a. 16, s. 1 to 30 &c.

CH. 223.

Art. 16.



§ 3. The *legitime*. It seems in Louisiana only a part of the estate can be disposed so as to exclude certain heirs, descendants, or ascendants, as book 3, tit. 2, art. 22 &c. "That portion of the property of which the law forbids the disposal to the prejudice of descendants or ascendants, is called the *legitime*, that portion is four-fifths of the property in favour of the legitimate children or descendants coming to the succession of their ascendants; and of two thirds of the property in favour of legitimate ascendants coming to the succession of their descendants." Such are called forced heirs; but the owner of the property may disinherit them for just cause.

Book 3, tit.  
2, art. 81, 90,  
&c.

§ 4. By this article no disposition *causa mortis* can be made, otherwise than by last will or testament, or by codicil; each must be in writing, signed by the testator, and witnessed by three or more witnesses, except some cases of codicils;—if not written by a notary, five witnesses of the place, or seven not of it, are required to a will; and many other precautions to prevent wills being incautiously made, or fraudulently obtained. There are three kinds of testaments or codicils,—the nuncupative or open, the mystic or sheet, and olographic or one written signed and dated by the testator's own hand. No female can be a witness, nor male under sixteen years of age, or insane or infamous person or slave, or legatee. But wills &c. made out of Louisiana, are valid therein, if made according to the laws of the place where made. The wife in Louisiana, as in France, has her separate property, and may, by will or otherwise, dispose of it; and baron and feme can convey to each other in several cases.

Lib. 3, tit. 6,  
a. 2, p. 364.

§ 5. "All sales of immoveable property or slaves shall be made by authentic act, or under private signature;" and "all verbal sale of any of these things shall be null, as well for third persons as for the contracting parties themselves, and the testimonial proof of it shall not be admitted." "The verbal sale of all moveable effects, whatever may be their value, is valid, but its testimonial proof must be made agreeably to what is directed in the title of contracts and conventional obligation in general." But "the sale of any immoveable or slaves, made under private signature, shall have effect to the prejudice of persons not parties to it, only from the day said sale was registered in the office of a notary," unless registered in six or ten days, then from the date; but is valid as to the parties, their heirs, and assigns, though not registered.

Art. 3.

§ 6. Generally a citizen of one State is acquainted with the laws in force in the others, for reasons already stated; but the State of Louisiana forms an important exception, because the citizens, and even lawyers, generally, of the other States,

are quite unacquainted with the French Civil Code she has adopted; therefore, to enable them to do business in a legal manner in that State, her laws must, in a special manner, be attended to in several of their most important parts.

CH. 223.  
Art. 17.

§ 7. By statute law, "all species of property may be seized on execution, moveables as well as immoveables, without any exception;" but the sale, after seizure, cannot be made, until the things seized have been appraised, by appraisers appointed by the parties, and sworn; or if the deft. neglect &c., one by the sheriff or judge, who shall make the sale at auction. Even to the usufruit a statute title may be had on judgment and execution, but not to the undivided share of a co-heir in a succession, till the creditor had got partition of the estate among the co-heirs.

Civil Code of Louisiana, p. 490.

§ 8. So by statute law title to property by occupancy and prescription, is regulated in that State; and the civil code, enacted March, 1808, declares occupancy is a mode of acquiring property, by which a thing which belongs to nobody, becomes the property of the person who took possession, with an intention of acquiring a right of ownership upon it. And the act enumerates five modes: 1. By hunting: 2. By fowling: 3. By fishing: 4. By invention, as discovering precious stones, or things abandoned, or a treasure: 5. By capture. In this State questions of fact in civil causes are tried by the court, unless either party demands a jury. 6 Wheat. 129, *Mayhew v. Thatcher & al.* A record of a judgment in one State is conclusive evidence in another.

Civil Code, p. 472.

ART. 17. § 1. *Statute titles* in the other and new States, formed and settled under said ordinance of Congress, passed July, 1787, before cited, art. 1, s. 3, containing, as there stated, the basis of titles to estates, real and personal, and on the common American principles. If these new States have varied or deviated from those principles, it has been as yet but in an inconsiderable degree, whatever may be the case in future periods of time, except Louisiana.

§ 2. *Some peculiar statute provisions.* In Tennessee, statutes permit an equitable title to be asserted in an action at law, but extend not to titles derived under Virginia; nor are the statutes of limitations of Tennessee pleadable to such titles under Virginia. And by Virginia law an equitable title, founded on a prior entry on lands, can be shown but in equity, and not in a suit at law. At law the legal title prevails there as at common law.

3 Wheat. R. 212, 230, *Robinson v. Campbell.*

§ 3. By the laws of Tennessee, whether a grant be absolutely void or voidable only, a junior grantee is not allowed to avail himself of its nullity, as against an innocent purchaser,

*Polk's lessee v. Wendell & al.* 5 Wheat. 293.—See *Jackson v. Holt*, Id. 111.

Honeycut, 1 Tenn. R. 30; *Dodson v. Cock*, Id. 232; *Miller v. Holt*, Id. 111.

CH. 223. without notice. See art. 12, s. 6. Decided in ejectment  
 Art. 17. for 5000 acres of land in West Tennessee: 2. Held, if a  
 grant be void, as if the State has no title, or the officer making it no power, the case may be examined at law: 3. A regular warrant is evidence of an entry, and from the existence of the grant, prerequisites may be inferred. See *Sevier & al. v. Hill*, p. 306. For decisions in North Carolina on the acts of 1777, 1778, 1783, see Taylor's R. 114; North Carolina R. 441; North Carolina Law Repository, 363; holding an entry an essential part of a title.

*Williams v. Wells.*

6 Wheat. 577,  
*Clark & al. v. Graham.*

§ 4. *State of Ohio.* The laws of this State require all deeds of land to be executed in the presence of two witnesses, and a deed executed in the presence of one witness only, is void, (so was the ordinance of July 13, 1787.) Was decided in ejectment: 2. Held further, a power to convey lands must have all the formalities deeds have, actually conveying lands: 3. Title to lands can be acquired or lost, but by the laws of the State in which they are situated: 4. No exchange of land can be proved or explained by parol. The statute of Ohio, enacted February 14, 1805, provides, "that all deeds for the conveyance of lands, tenements, and hereditaments, situate, lying, and being within the State, shall be signed and sealed by the grantor in the presence of two witnesses, who shall subscribe the said deed or conveyance, attesting the acknowledgment of the signing and sealing thereof; and if executed within the State, shall be acknowledged by the party or parties, or proven by the subscribing witnesses, before a judge of the Court of Common Pleas, or a justice of the peace in any county in the State."

§ 5. *Remarks on a few material parts of the said ordinance of Congress of July 13, 1787.* These are occasioned by the manner in which it was considered in the great Missouri debate in Congress in 1820 &c. As it has been the foundation of government in numerous States and territories, it is important that certain strong features in it should be well understood, especially as to slavery, impairing contracts, drawing new States into the Union, principles of compact, and it being within the power of Congress to enact it. It was enacted with but one dissenting voice, and had been in 1820 in full operation thirty years and more, quietly and without exception. In that debate on the question, if slavery should be extended to Missouri, this ordinance by the advocates of such slavery was attacked, on the first, fourth, and fifth points, stated above. It was ably defended by the opposers of that slavery, as containing the essence of sound American principles. A senator from the State of Ohio in Congress declared, that in settling that State it had been the cloud by day and the pillar of fire by night.

§ 6. In that debate it was denied that this ordinance could operate on the principles of compact. It may be observed, that in July 1787, also, when the Federal constitution was adopted, our country consisted of two great portions: 1. *The thirteen Old States*, including our lands southeast of the river Ohio &c.; this portion was then all under State governments, and contained about 600,000 square miles: 2. *The Western Territory*, including our lands northwest of that river, containing about 400,000 square miles. This second portion (territory) was then exclusively under the government of Congress. When this ordinance was enacted, no part of the land in this territory had been sold by the United States, and no settlements had been made in it by them. Hence, it was well understood by all parties, that all persons who should purchase and settle lands in it would buy and settle under this ordinance, and so would submit and become parties to it in the meaning most effectually binding them to the terms and principles of it; and so invariable the case was understood prior to this Missouri contest. This idea of a compact, expressed in the ordinance, was as early as April 1784, unanimously adopted in Congress in a number of fundamental principles reported by Mr. Jefferson of Virginia, Chase of Maryland, and Howell of Rhode Island, and voted, South Carolina only dissenting. So the article against slavery was supported March 16, 1786, by a large majority, as an article of compact, and to remain a "fundamental principle of the constitution between the thirteen original States and each of the States" in said territory. And in July 1787, the principle and form of compact were unanimously agreed to and so allowed, until the Missouri contest, by all; then the compact nature in the ordinance seems to have been denied, because, as said, there were no people in this territory to make a second party when the ordinance was passed. If there be no private estates, nor inhabitants in a territory, the sovereign owner (as the Union in Congress then was) has complete authority to establish a system of sales of lands and of government, binding on all who agree to buy and settle under it, from time to time; and who become parties to the system, as they buy and settle under it. And it has been invariably true, that the people of this western territory have purchased their lands, settled and held their estates in it, under the ordinance, and so consented to it, under it lived, made laws, and in fact, as will be further shewn, claimed to be admitted as States into the Union. For the constitution of the United States only provides, "new States may be admitted by Congress into the Union." This affords no claim to be admitted, but barely gives a power to admit, and on admission no claim "to the same rights of sove-

CH. 223.  
Art. 17.

Art. 4, sect. 3,

CH. 223. reignty, freedom, and independence as the other States," as  
 Art. 17. expressed in a resolve of Congress of October 10, 1780, formally made a condition by Virginia only, as will appear presently. Hence it may be called the *Virginia condition*, for the sake of a name.

§ 7. Also in the said Missouri debate this ordinance was said in part to be a usurpation, and not within the powers of Congress to enact. It is to be observed, that when it was passed, that body possessed the exclusive powers to sell the lands, and to establish government in the said territory, as no other power whatever existed in it; for France, Great Britain, and the several States once claiming there, had entirely relinquished both soil and jurisdiction therein to the United States. Hence their jurisdiction as to both had become complete and exclusive, and to be exercised by Congress alone, of right and of necessity. Of course Congress had the power and the right to elect the form of government, founding it always on the fundamental principle of Federal America, and on the State cessions. These principles are conspicuous in all parts of the ordinance. The objection, that it did not sufficiently favour freedom as to a territorial system, was also made. This objection will vanish when we properly consider the peculiar state of our country in July 1787; then the Federal constitution had not been formed; then there were strong apprehensions that the territories, or some of them, might not be disposed to come into the Union as States, if they should have territorial governments that should make their condition as territories, as much to their wishes or more so, as it probably would be when States in the Union. Hence it was deemed best by all but one member, so to form their territorial system as to create some real motives in them to draw and bring them as States into the Union in due time.

§ 8. The great question made was, whether the sixth article in the ordinance excludes negro slavery from the States in the said territory. This question is become important, as since the Missouri contest considerable attempts have been made and are making to introduce into those States this kind of slavery, especially into the State of Illinois. If there be any pretence for so introducing it, it must be solely on the resolve of Congress of October 10, 1780, and the Virginia cession made and accepted thereon. That resolve recommended, in pursuance of one of Sept. 6, 1780, to those States which had claims to the western country, to cede them to the United States to "be disposed of for their common benefit," and to be "settled and formed into distinct republican States, which shall become members of the Federal Union, and have the same rights of sovereignty, freedom, and independence, as

*the other States,"* and to "be granted or settled at such times and under such regulations," as Congress should make. Then the confederation was not ratified. CH. 223.  
Art. 17.

March 1, 1781, New York made her cession of soil and jurisdiction to the United States for their common benefit, "to be granted, disposed of, and appropriated in such manner only as the Congress" of the United States "shall order and direct." This cession, made by the agents of New York, was grounded on her act passed March 7, 1780; so before the said resolves of Congress were passed;—so of course had no reference to the clause in that of October 10, 1780, in *italics*, "have the same rights" &c. October 29, 1782, Congress accepted the cession as made by the State to the common use and benefit, saying nothing about the conditions or terms of admission of new States into the Union. Journal of  
Congress,  
March 1,  
1781, p. 43,  
47.  
  
Journal of  
Congress,  
1782, p. 618.

January 2, 1781, Virginia passed an act ceding to the United States all her right, title, and claim to lands northwest of the river Ohio, on eight conditions expressed. This cession was not accepted by Congress, and was opposed by Maryland and New Jersey &c., on the ground that neither Virginia nor any other particular State had any right to lands in the said territory. Journal of  
Sept. 1783,

October 20, 1783, Virginia altered her act, and authorized a cession to the United States of "all right, title, and claim, as well of soil as jurisdiction, which this Commonwealth hath to the territory or tract of country within the limits of the Virginia charter, situate, lying, and being to the northwest of the river Ohio, subject to the terms and conditions contained in a resolve of Congress of Sept. 13, 1783, that is to say, upon condition that the territory so ceded, shall be laid out and formed into States," (of a certain extent each,—afterwards altered,) "and that the States so formed shall be distinct republican States, and admitted members of the Federal Union, having the same rights of sovereignty, freedom, and independence as the other States." There were some other conditions not now material. March 1, 1784, Congress voted to accept the cession when the deed should be executed; this being done, Congress accepted it. Journal of  
Congress,  
March 1784.  
  
The Virginia  
conditions.

April 19, 1785, the cession of Massachusetts was made of her part of said territory to the United States, "to be disposed of for the common benefit of the same, agreeably to the resolve of Congress," of October 10, 1780; as by Massachusetts act of November 13, 1784, the deed of cession was to the uses mentioned in said resolve. This cession laid no stress on the clause in it as to *having the same rights of sovereignty* &c. as the other States. Journ. April,  
1785.

September 13, 1786, Connecticut made her cession for Journ. Sept.  
1786.



CR. 223. *the common use and benefit* of the United States, agreeably to  
 Art. 17. the resolve of Congress of May 26, 1786. This contained  
 ~~~~~ no condition, and was a bare cession, made and accepted.

Thus the admission of a new State into the Union, formed in said territory, "having the same rights of sovereignty, freedom, and independence, as the other States," seems to be made a matter of *compact* in the Virginia case only.

§ 9. Now it has been urged, that every old State in the Union has a right to establish slavery, by statute or by constitutional law; that there were slaves in all of them October 10, 1780; and that therefore by this compact, when a new State, in this Territory, is admitted into the Union, she acquires this right to establish slavery, on such footing of equality, whatever may have been her case when a territory; even though then slavery was by the ordinance or otherwise excluded. Until the Missouri contest, the opinion in and out of Congress was, that such a provision against slavery as is in said ordinance, would for ever exclude it constitutionally from the said territory, and all parties conducted according to this opinion, until said contest arose. Accordingly we find that as early as April 1784, as above, Mr. Jefferson &c. reported, and their report proposed to exclude slavery after the year 1800. Sixteen members, including him, voted for this exclusion, (perpetual) and seven only voted against the report;—their votes might or might not be on account of this slavery. March 16, 1785, the article as it is in the ordinance, was again supported by a large majority as before stated, and in July 1787, by all the members, for Mr. Yates's *no* was on another account.

The first art. 9th sect. of the Federal constitution, the powers of Congress, is thus:—"The migration or importation of such persons, as any of the States now existing shall think proper to admit, shall not be prohibited by Congress, prior to the year one thousand eight hundred and eight; but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person." This provision was adopted by the convention after the said ordinance was made and published. This 9th section empowered Congress to tax imported slaves till January 1808, and by fair implication to prohibit their importation wholly after that time,—but only as to the States, (the thirteen old States,) existing in 1787. Why were these powers thus confined to the thirteen old States? Why not extended to the said territory, if slavery was not permanently excluded therefrom by said ordinance? Ohio was admitted as a State into the Union long before January, 1808. She then, when admitted, acquired, if ever, the right to establish the slavery. Suppose she then did, and so the 6th art. in the ordinance against slavery became void, what was her

situation prior to January 1808? Clearly she had a right to admit slaves imported free of said tax of \$10 each person; as said 9th sect. did not extend to her, unless she submitted to it by coming into the Union, and claiming the same rights as the other States were subject to it. This section clearly makes a distinction, as things were in 1787, between the thirteen old States and the said territory; as it limited the powers of Congress as to them, not as to that.

CH. 223.

Art. 17.

§ 10. The Federal constitution gives Congress no power whatever as to slavery, in the said territory, or as to States formed in it; yet Congress, March 2, 1807, enacted, that after January 1, 1808, "it shall not be lawful to import, or bring into the United States, or the territories thereof, from any foreign kingdom, place, or country, any negro, mulatto, or person of colour, with intent to hold, sell, or dispose of such negro, mulatto, or person of colour, as a slave, or to be held to servitude or labour." When this act was passed, part of said territory was formed into the State of Ohio, and in the Union, and part was under said ordinance. This act, ever allowed to be valid, made it as unlawful to import slaves into said State of Ohio and the residue of said territory, as into the said thirteen old States. On what principle did this act become binding on the said State of Ohio, and said residue? Most clearly on the general powers of Congress, exercised in the ordinance, or on the said condition expressed in the resolve of October 10, 1780, agreed to by Virginia, to wit: the same rights &c. as the other States. If on said condition, the admission of Ohio into the Union had two operations at the same instant, directly different, one to give her the right to establish slavery, the other to subject her to the said 9th sect. as the old States were subjected,—operations, it is believed, never thought of, till the Missouri contest. But the practice and course of thinking had ever been on the other principle, and is yet so generally; that is, the said general powers of Congress, exercised in the said ordinance, and in this way, that was in force when the constitution was formed and adopted, and on the face of it perpetually excluded slavery from the whole of said territory, agreed to as well by the slave-holding, as the non-slave-holding States; and said 9th section in the constitution empowered Congress, by a tax, to restrain imported slavery until January 1, 1808, and after that day to prohibit it, but only in the said thirteen old States; not at all in the said territory or States formed therein, unless the convention, when it formed the constitution, and the people when they adopted it, contemplated and believed in the mystical double operation above stated, a matter not mentioned, and probably not thought of for above thirty years. The people

СН. 223. could never mean first to tax, and then prohibit imported  
 Art. 17. slavery in the old States, and admit it freely in the new. It  
 is admitted, all negro slavery was excluded from the said  
 territory, while under territorial government, by the general  
 powers of Congress exercised in said ordinance. To what  
 purpose to exclude it thus, if to be let in as soon as a territory  
 be turned into a State?

North Caro-  
 lina.

When North Carolina ceded to the United States the territory, now the State of Tennessee, she reserved the benefits of the said ordinance, and stipulated the ceded country be governed under it except as to slavery; this cession was accepted, and slavery allowed. This was consistent, as it existed in the territory when ceded, and was expected to continue when made a State. This exception shews, that if it had not been made, it was understood the said ordinance would have excluded slavery.

§ 11. It is clear the people of the said north-western territory accepted the said ordinance *in toto*, and invariably practised on it as to slavery while in a territorial condition, and since they have become States. Ohio, for instance, while a territory, accepted the ordinance *in toto*, when able to do it, received all the benefits of it;—her cloud by day, and pillar of fire by night;—on it alone was governed, lived under it, came into Union in virtue of it; and forever estates must be held under it. The people there have acceded to the article against slavery, and become parties to it, and bound by it, as well in a State as a territorial condition, when of age to be bound. This article was a special fundamental principle in the nature of compact; neither in word nor sense to end with the territorial condition; and a *special* provision, principle, or compact, is never annulled by a *general* one, as that of October 10, 1780, was, and which, probably, was never seen or heard of by one person in a thousand in the Union, or said territory. Whereas the exclusion of negro-slavery from said territory, by law and in practice, has been as notorious as the settlement of it,—near forty years. It has been a fact universally known in the United States, that slavery has never been admitted in the said territory or States therein.

§ 12. The provision against impairing contracts was first inserted in this ordinance, and afterwards in a better form of expression in the constitution. It was the result of much experience. There had been a continued scene of iniquity in most of the States, in which debtors by law were enabled to wrong their creditors. State legislatures enacted tender, paper money, and stop laws, which in thousands of cases enabled the debtor to pay or do, less than he had contracted to pay or do.

**ART. 18. *District of Columbia and other Federal districts.*** CH. 223.

§ 1. The laws in the numerous Federal districts rest on the 1st art. sect. 8, 17, of the constitution of the United States, in these words, viz.: Congress shall have power "to exercise exclusive legislation in all cases whatever over such district, (not exceeding ten miles square) as may, by cession of particular States, and acceptance of Congress, become the seat of government of the United States; and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same may be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

Art. 18.



2. *District of Columbia.* Congress July 16, 1790, passed an act for fixing the seat of government on the river Potomac at a place named, and in said act accepted the cession of Virginia of Dec. 3, 1789, for this purpose. By these acts the county of Alexandria in said district was so ceded and accepted; and by a like cession of Maryland and accepted, the county of Washington in said district is the other part of said district. Said act of Congress fixed the first Monday in Dec. 1800, for the removal of the government to said district;—was removed on that day, but Congress did not by law provide for the government thereof, under their jurisdiction, until the 27th of February 1801. And held in this case, the rights of Virginia and Maryland to legislate for said places so respectively ceded, continued to that day; and by said act Congress provided the laws of Virginia and Maryland, "as they now exist," (Feb. 27, 1801,) shall continue in force in the part by each ceded until altered by Congress. The numerous suits carried from the courts of this district to the Supreme Court of the United States by appeals and writs of error &c. repeatedly bring the laws of those two States into view; and in this way we have fair constructions of those laws in many cases, in the reports of the decision of this court, foundation of titles thereon. 6 Cranch, 53.

4 Cranch,  
384, Young v.  
The Bank of  
Alexandria.

See 1 Cranch,  
262, note.

§ 8. *Citizen of, his rights, disabilities, &c.* By its separation from Virginia and Maryland, he ceased to be a citizen of those States respectively, and he could not be discharged on the insolvent law of Maryland of January 3, 1800, living in the district at the time of the separation, unless he had fully complied with the act before the separation: 2. He cannot maintain an action in the Circuit Court of the United States for the district of Virginia against a citizen of Virginia, but he may sue a citizen of the district of Columbia in its circuit. He is not a citizen of a State.

2 Cranch,  
344, Riely v.  
Lamar,  
2 Cranch,  
445, Hepburn  
v. Ellzey.—  
1 Cranch,  
262, United  
States v.  
Simms.

§ 4. On error &c. held, the acts of Congress of Feb. 27, 1801, and March 3, 1801, as to this district, did not change

CH. 223. the laws of Maryland and Virginia, adopted as the laws of it  
 Art. 18. by Congress, any further than a change of jurisdiction rendered  
 a change of laws necessary : 2. Fines and forfeitures and penalties arising from the breach of those laws must be recovered as they were before the jurisdiction was changed, *mutatis mutandis*. The deft. was indicted for suffering a faro-bank to be played in his house contrary to a statute of Virginia,—was error in a criminal case. See Ch. 188, a. 2, s. 6. Held, error and appeal in this district lies only in civil causes.

January 19,  
 1798.—1  
 Cranch, 252.

§ 5. This statute of Virginia (in force in the Virginia part of the district of Columbia,) enacted, "that any person whatsoever who shall suffer the game of billiards, or any of the games played at the tables commonly called A, B, C, E, O, or faro-bank, or any other gaming-table, or bank of the same or the like kind, under any denomination whatever, to be played in his or her house, or in a house of which he or she hath at the time the use or possession, shall for every such offence forfeit and pay the sum of \$150, to be recovered in any court of record by any person who will sue for the same." Held, this penalty could not be recovered by indictment, but this Virginia act must be followed and debt sued. Act of Congress March 3, 1801, enacted, "that all indictments shall run in the name of the United States, and conclude against the peace and government thereof; and fines, penalties, and forfeitures, accruing under the laws of the States of Maryland and Virginia, which by adoption have become the laws of the district, shall be recovered with costs by indictment or information in the name of the United States, or by action of debt in the name of the United States and of the informer; one half of which fine shall accrue to the United States, and the other half to the informer; and the said fines shall be collected by, or paid to the marshal, and one half thereof shall be by him paid over to the board of commissioners hereinafter established, and the other half to the informer." Held, this provision did not alter the process on the Virginia act from debt to an indictment, nor change the appropriation of fines; but the mode of punishment to what it was before the Virginia penitentiary system was adopted is established. *Simms' case*, as to administration. See Ch. 29, a. 1, s. 17. As to the laws of Virginia and Maryland in regard to bills, and notes, and negotiable contracts, see Bills and Notes, Ch. 20, and especially *Chose in Action*, Ch. 24; and the Virginia statutes as to bonds sued, Ch. 24 &c.

Loughborough v.  
 Blake, 6  
 Wheat. 317.

§ 6. Held, Congress has power to lay a tax on the district of Columbia in proportion to the census, and such power is coextensive with the territory of the United States.

## CHAPTER CCXXIV.

## SEIZURES IN REVENUE AND OTHER CASES.

ART. 1. *General principles.*

§ 1. Numerous are the cases in which a man's property or a part of it may be seized. Seizures are of every kind of property, real, personal, and mixed, qualified, in trust, and in action; or however held, in possession or reversion, in common or severalty. Seizure is usually the effect of forfeiture, or this immediately precedes and is the ground of seizure in most cases. Forfeitures are created in all cases, by some known law by which a right accrues to the government by its courts or officers, agents, or persons designated; or to some person or persons to seize the thing forfeited, and take it from the party who has forfeited it. Forfeiture of property is generally the effect of, and a penalty annexed to some crime or offence; some personal misconduct, voluntary or negligent;—some *malfeasance*, *misfeasance*, or *non-feasance*, in violation of some law; but not always; for the owner of property may by the mere act of his government, rulers, or nation in making war, or in the infliction of wrongs on another nation, forfeit his property and afford a right to such nation to capture or seize it. The right of seizure arises in some cases from the law of nature, as the right to seize a fish at large in the sea, or a wild beast in its natural state in the wilderness. In such cases the right to seize is merely the right to take and appropriate property found in a state of nature, and not appropriated by any one. This right has been already considered. In several cases this right to seize another's property arises from the law of nations, because the owner of it has forfeited his right to hold it by infractions of that law. So in many cases this right to seize arises from, or is grounded in the laws of war, general or partial. This right the belligerent has to seize the property of his enemy in war, any where but in neutral territory or jurisdiction; so contrabands of war from a neutral; and so the neutral's provisions obviously in their way to supply and aid this enemy in his military operations. But this right to seize in war, and in cases of reprisals comes properly under the head of captures. So in many cases this right to seize and arrest from one his property rests on the common law. But this right arises in cases much the most numerous from statute laws. In every civilized

CH. 224. nation, and especially in a numerous one, numerous are the statutes which give this right of seizure for various causes, and in different cases. It is such statutes in the United States that will be principally attended to in this chapter, and especially acts of Congress; that is, acts which on the ground of forfeiture give a right to seize and take into custody property, as soon as it is deemed by the proper tribunal, officer, or person to be forfeited by illegal conduct, and before trial. Cases in which the right to seize or take from a man his property in execution after trial and judgment, or by distress, have been already considered. Also, many cases of seizure immediately and before trial have been already noticed in this work occasionally, and as incidental to other matters; as in treating of crimes and punishments, forfeitures, officers and offices, trover, and trespass, and replevin, penalties, &c. Here then it remains to consider this right of seizure in a few of those material cases in the United States, in which this right to seize is not secondary or incidental in the suit or case, but where it is the most material point in the suit or proceeding. It is a material principle, to be observed in all cases of seizure, that the forfeiture attaches the moment the offence is committed, and the owner's property is instantly divested, so that if he afterwards sell to an innocent person for a valuable consideration, and without notice, he cannot hold the property. But see subsequent cases. But it will also be observed, that there never can be a seizure of a thing before trial, but where its owner has forfeited the thing itself, and of course in no case where he forfeits, or is fined in a sum of money only, which can be levied or raised by an execution or warrant of distress after judgment against him.

4 Cranch,  
513.

9 Cranch,  
291.

§ 2. Whenever there is a seizure of a vessel, goods, &c. in the first instance, the question usually is, if a lawful seizure, and this usually proceeds *in rem*. And it is laid down as law, that the Court of Admiralty acts wholly *in rem*, and so "not affecting the rights of any persons whomsoever, except so far as they exist in the thing which is the subject of the libel," on which, it is held, its decrees are conclusive against all the world; and it seems plainly to follow, that whenever a court acts and decides wholly *in rem*, it must have the possession, or at least, the disposition of the thing libelled or informed against, otherwise it cannot carry its decision into effect, excepting in cases in which it may remand the cause to another court to do execution.

§ 3. Enemy's property in our country at the commencement of a war is not liable to seizure. See Ch. 187, a. 7. s. 32.

ART. 2. Common law principles.

§ 1. Upon these principles any person may, at his peril, seize for a forfeiture to the government; and if the government admit his seizure and the property is condemned, he is justified. Nor is it necessary to justify the seizure, the party seizing be entitled to a part of the forfeiture: and the case is more in his favour if entitled to a part of it. And if a ship be lawfully seized under the navigation act (12 Ch. II.) as forfeited, the property is, instantly, divested out of the owner, and he cannot have trespass, though no judgment of condemnation be entered; but the seizure must be lawful, and a forfeiture exist, or trespass will lie. The owner must put the forfeiture in issue. And if a vessel navigate contrary to that act, his property is divested, as it is actually forfeited by her so navigating. Salk. 223, 2. W. Bl. 1174. But if an excise officer seize goods as forfeited, he must prove they were forfeited, or he is liable in trespass; Ch. 96, a. 3, 6, 7, 8;—and even if the commissioners of excise condemn them, as their condemnation is not conclusive; *Id.* and in several cases cited. But officers enter houses to seize run goods at their peril of finding some in it. Ch. 96, a. 3, s. 8, cited 2 Stra. 820: 3 Wils. 634, 442; and 3 Wils. 63. See Ch. 96, a. 3, s. 1, *Scott v. Shearman*, the effect of a condemnation of seized goods in the exchequer chamber, conclusively, to protect the officer seizing them, as it binds all concerned from the seizure, being *in rem*, and cases cited.

§ 2. It is a general principle that the owner of goods cannot forfeit them, (so they cannot be seized) by any act done, without his consent or connivance, or that of some person employed or trusted by him.

§ 3. *A's property in a personal thing, as a ship, &c. is forfeited at common law &c.* when is it divested as to a *bonâ fide* purchaser? This does not seem to be well settled in England or in the United States. Some hold, at the moment the offence is committed: some, only by the seizure, (conviction after open seizure cannot be material,) clearly, not even under a statute, till seizure, or at least information filed where a common informer has part, as he is any body, and no body, till he seizes or legally informs. C. J. Marshall, 8 Cran. 408, says, "It has been proved that in all forfeitures occurring at common law, nothing vests in the government, until some legal step shall be taken for the assertion of the right." See Judge Story's and Circuit Court's opinion, post, a. 11, s. 4, and 8 Cran. 405, to the same effect, and many authorities there cited, several of which are cited in different parts of this work, as *Foxley's case*; *Lockyer v. Offley*; *Roberts v. Wetherell*; *Wilkins v. Despard*; *Rex v. Ward*.

By the general maritime law, condemnation extinguishes the former owner's title. 3 Wheat. R. 8, case of the *Star*.

CH. 224.  
Art. 2.

3 Wheaton's R. 310, 311, *Gelston v. Hoyt*.—See Ch. 96, a. 3, s. 4, 5, and several cases cited—6 D. & E. 112.—5 Mod. 191.—12 Mod. 92.—1 D. & E. 252, *Lockyer v. Offley*.—Ch. 40, a. 21, 9.—3 Cranch 389.—3 Co. 28, 29 *Plowden*, 261. Ch. 18, a. 3, 23.—1 Lev. 8.—1 Hale's P. C. 414.—Cro. Jam. 82.—

4 Cranch, 347, *Peisch & al. v. Ware*.

3 Cranch. 337, *U. States v. Grundy*—Cited 8 Cran. 408.—4 Bl. Com. 481, 487.—Co L. 390.—Skinn. 357.



CH. 224. ART. 3. *Statutes enacting forfeitures and authorizing seizures.*  
 Art. 3. *ures.*

Act of Congress, March 2, 1799; former acts revised.

§ 1. Such are very numerous in the laws of the United States and of the several States; and, generally, must be referred to and examined in our statute books; and principally in those of the United States, which enact forfeitures of vessels and goods, and seizures thereof in cases of *revenue, embargo, non-intercourse, non-importation, non-exportation, of prohibited trade, fitting out armed vessels illegally, &c.*

§ 2. *Revenue.*—This act providing for the collection of duties on goods imported into the United States from foreign ports or places, enacts, in several cases, that the same, when run or smuggled in, shall be forfeited and seized: as sect. 24 enacts, that all goods so imported, not included in a manifest or manifests, belonging or consigned to the master, mate, officers, or crew of “any ship or vessel, belonging, in whole or in part, to a citizen or citizens, inhabitant or inhabitants of the United States,” shall be forfeited, unless made to appear that no part of the cargo of such ship or vessel had been unshipped after taken on board, except such part as shall have been particularly specified and accounted for &c.—manifest lost &c. Sec. 27 enacts, “that if after the arrival of any ship or vessel, so laden with goods as aforesaid, and bound to the United States, within the limits of any of the districts of the United States, or within four leagues of the coasts thereof, any part of the cargo of such ship or vessel shall be unladen, for any purpose whatever, from out of such ship or vessel, as aforesaid, before such ship or vessel shall come to the proper place for the discharge of her cargo, or some part thereof, and shall be there duly authorized by the proper officer or officers of the customs to unlade the same, the master, or other person having the charge or command of such ship or vessel, and the mate or other person next in command, shall, respectively, forfeit and pay the sum of one thousand dollars for each such offence, and the goods, wares, and merchandise, so unladen and unshipped, shall be forfeited and lost, except in the case of some unavoidable accident, necessity, or distress of weather;” of which necessity, &c. notice is to be given &c.

§ 3. Sec. 30 to 35 provide for a further report to be made of spirits, wines, and teas for proper authority for unlading them &c.; also for sailing from port to port, and, among other things, enacts, for the violation of the provisions in these sections, that “the spirits, wines, and teas on board her, shall be forfeited and may be seized.”

§ 4. So sections to 45 provide for making entries, reports of sea stores, &c.; and sec. 45 enacts, that any excess thereof

CH. 224.

Art. 3.

may be valued, and that if any other or greater quantity of articles are found on board such ship or vessel, as sea stores, than are specified in such entry, or, if any of the said articles shall be landed without a permit first obtained from the collector or naval officer of the port (where any) for that purpose, all such articles as are not included as aforesaid in the report or manifest, delivered on oath, or affirmation, as aforesaid, by the master or other person having the charge or command of such ship or vessel, or which shall be landed without such permit, as aforesaid, shall be forfeited, and may be seized ;" also, such person forfeits treble the amount or value, of the articles so omitted or landed. Sec. 46, like provisions as to articles found in baggage.

§ 5. Sec. 50 provides for landing all goods in the day time, and not without a permit ; and enacts that " if any goods, wares, or merchandise, shall be unladen, or delivered from any ship or vessel, contrary to the direction aforesaid, or any of them," the master &c. shall forfeit and pay each \$400 &c. " and all goods, wares, or merchandise, so unladen or delivered, shall be forfeited, and may be seized by any of the officers of the customs ; and where the value thereof, according to the highest market price of the same, at the port or district where landed, shall amount to four hundred dollars, the vessel, tackel, apparel, and furniture shall be subject to like forfeiture and seizure."

§ 6. Sec. 51 provides, that if goods, so imported, " requiring to be weighed, guaged, or measured, in order to ascertain the duties thereon, shall, without the consent of the proper officer, be removed from any wharf or place, upon which the same may be landed or put, before the same shall have been so weighed, guaged, or measured, and if spirits, wines, teas, or sugars, before the proof or quality and quantity thereof is ascertained and marked thereon, by or under the direction of the proper officer for that purpose," " the same shall be forfeited, and may be seized, by any officer of the customs or inspection."

§ 7. Also, sec. 66 provides, that if goods so imported and entry made " shall not be invoiced according to the actual costs thereof at the place of exportation, with design to evade the duties thereupon, or any part thereof, all such goods, wares, or merchandise, or the value thereof,—to be recovered of the person making entry,—shall be forfeited ;" and if the collector suspects such fraud he must take them into his possession, until such value be ascertained, and duties paid or secured.

§ 8. Sec. 68 provides, " that every collector, naval officer, and surveyor, or other person specially appointed by either of

CH. 224.

Art. 3.



them for that purpose, shall have lawful power and authority to enter any ship or vessel, in which they shall have reason to suspect any goods, wares, or merchandise, subject to duty, are concealed, and therein search for, seize, and secure such goods, wares, and merchandise; and if they shall have cause to suspect the concealment thereof in any particular dwelling-house, store, building, or other place, they, or either of them, shall, upon proper application, on oath, to any justice of the peace, be entitled to a warrant to enter such house, store, or other place, (in the day time only,) and there to search for such goods; and if any shall be found, to seize and secure the same for trial; and all such goods, wares, and merchandise, on which the duties shall not have been paid, or secured to be paid, shall be forfeited."

§ 9. Sec. 69 enacts, "that all goods, wares, or merchandise, which shall be seized by virtue of this act, shall be put into, and remain in the custody of the collector, or such other person as he shall appoint for that purpose, until such proceedings shall be had as by this act are required, to ascertain whether the same have been forfeited or not; and if it shall be adjudged that they are not forfeited, they shall be, forthwith, restored to the owner or owners, claimant or claimants thereof; and if any person or persons shall conceal or buy any goods, wares, or merchandise, knowing them liable to seizure by this act, such person or persons shall, on conviction thereof, forfeit and pay a sum double the amount or value of the goods, wares, or merchandise, so concealed or purchased."

§ 10. By sec. 70 it is enacted, "that it shall be the duty of the several officers of the customs, to make seizure of, and secure any ship or vessel, goods, wares, or merchandise, which shall be liable to seizure by virtue of this or any other act of the United States, respecting the revenue, which is now, or may hereafter be enacted, as well without as within their respective districts."

§ 11. Sec. 71 enables the officer, or person seizing, aider, or assistant sued, or molested, &c. to plead the general issue, "and give this act and special matter in evidence;" also punishes resistance to the officer &c.; gives him double costs, if judgment for him; and lays the *onus probandi* "in actions, suits, or informations to be brought, where any seizure shall be made pursuant to this act, if the property be claimed by any person," upon the claimant, but—"only where probable cause is shewn, to be judged of by the court."

§ 12. Sec. 84 provides for the forfeiture of the goods &c. on making a false entry for exportation for the benefit of

drawback or bounty, where such entry is not by mistake or accident. CH. 224  
Art. 3.

§ 13. Sec. 89 provides the penalties be sued for and recovered with costs, in the name of the United States of America, "in any court competent to try the same;" and the trial of any fact put in issue, must be in "the judicial district in which any such penalty shall have accrued; and the collector, within whose district the seizure shall be made, or forfeiture incurred, is hereby enjoined to cause suits for the same to be commenced without delay and prosecuted to effect," and is empowered to receive the monies from the court &c.; "and all ships, or vessels, goods, wares, or merchandise, which shall become forfeited in virtue of this act, shall be seized, libelled and prosecuted as aforesaid, in the proper court, having cognizance thereof;"—provides the manner of notice, appraisement, &c., delivery of the ship or goods to the claimant, on good security to pay the value &c.

Construction,  
4 Wheaton,  
74, 76.

§ 14. This sect. 89, also enacts, "and when any prosecution shall be commenced on account of the seizure of any ship or vessel, goods, wares, or merchandise, and judgment shall be given for the claimant or claimants, if it shall appear to the court, before whom such prosecution shall be tried, that there was a reasonable cause of seizure, the said court shall cause a proper certificate or entry to be made thereof; and in such case the claimant or claimants shall not be entitled to costs, nor shall the person who made the seizure, or the prosecutor, be liable to an action, suit, or judgment, on account of such seizure and prosecution," provided the vessel or goods be forthwith restored, after judgment, to the claimant, &c. Suits limited to three years next after the penalty or forfeiture incurred.

§ 15. By sect. 91, if "any officer or other person entitled to a part or share of any of the fines, penalties, or forfeitures, incurred in virtue of this act, shall be necessary as a witness, on the trial, for such fine, penalty, or forfeiture, such officer or other person may be a witness upon the said trial; but in such case he shall not receive, nor be entitled to any part or share of the said fine, penalty, or forfeiture; and the part or share to which he otherwise would have been entitled, shall revert to the United States."

§ 16. By sect. 103, beer, ale, and porter, imported by sea, are forfeited, if not brought in in certain casks, or vessels, packages, as also the ship. Nor can loaf-sugar be imported but in vessels of 120 tons or more, and but in casks or packages, each of 600 pounds weight or more. So some other small articles,—like forfeiture of goods and vessel,—some exceptions.

CH. 224.

Art. 4.



§ 17. These are the principal provisions, and ever have been in the statutes of the United States, respecting forfeitures and seizures in revenue cases. Penalties and forfeitures in the act relating to the *fisheries*, passed February 16, 1792, are sued for and recovered as above, in several cases. While the act of Congress, passed July 24, 1813, laying a duty on sugar refined, remained in force, sugars on which it was not paid were forfeited, and might be seized.

United States  
v. Six pack-  
ages of goods,  
6 Wheaton,  
520, 528;  
Toler claim-  
ant.

§ 18. *Smuggling by an agent.* Held, the goods were forfeited by his short entry; and that the forfeiture was not purged, though the owner afterwards made a true entry; nor can it be in such, unless the short entry be by mistake or accident, and not from an intention to defraud the revenue. See 67 sect. collection act of March 2, 1799, c. 128.

ART. 4. *Mitigation &c. of fines, penalties, forfeitures, &c. in Federal revenue cases.*

Act of Con-  
gress of  
March 3,  
1797, and  
made perpe-  
tual Feb. 11,  
1800.

§ 1. Through the District Court.—By sect. 1, when any person injured by any fine, penalty, forfeiture, or disability, or interested in any vessel or goods, which shall have been subjected to any “seizure, forfeiture, or disability, by force of any present or future law of the United States, for laying, levying, or collecting any duties or taxes, or by force of any present or future act, concerning the registering and recording of ships and vessels, or any act concerning the enrolling and licensing ships or vessels employed in the coasting trade or fisheries, and for regulating the same, shall prefer his petition to the judge of the district in which such fine, penalty, forfeiture, or disability, shall have accrued, truly and particularly setting forth the circumstances of his case, and shall pray that the same may be mitigated or remitted, the said judge shall inquire, in a summary manner, into the circumstances of the case, first causing reasonable notice to be given to the person or persons claiming such fine, penalty, or forfeiture, and to the attorney of the United States for such district, that each may have an opportunity of shewing cause against the mitigation or remission thereof; and shall cause the facts, which may appear upon such inquiry, to be stated and annexed to the petition, and direct their transmission to the secretary of the treasury of the United States, who shall thereupon have power to mitigate or remit such fine, forfeiture, or penalty, or remove such disability, or any part thereof, if, in his opinion, the same shall have been incurred without wilful negligence, or any intention of fraud in the person or persons incurring the same; and to direct the prosecution, if any shall have been instituted for the recovery thereof, to cease and be discontinued, upon such terms or conditions as he may deem reasonable and just.”

§ 2. Sect. 2 enacts, that "the judicial courts of the several States to whom, by any of the said acts, a jurisdiction is given, shall and may exercise all and every power in the cases cognizable before them, for the purpose of obtaining a mitigation or remission of any fine, penalty, or forfeiture, which may be exercised by the judges of the District Courts, in cases depending before them."

Сн. 224.

Art. 5.

§ 3. Sect. 3. "Provided always that nothing herein contained, shall be construed to affect the right or claim of any person, in that part of any fine, penalty, or forfeiture, incurred by the breach of any of the laws aforesaid, which such person shall, or may be entitled to, by virtue of the said laws, in cases where a prosecution has been commenced, or information has been given before the passing of this act, or any other act relative to the mitigation or remission of such fines, penalties, or forfeitures; the amount of which right and claim shall be assessed and valued by the proper judge or court, in a summary manner."

ART. 5. *Embargo acts.* Though these acts are usually temporary, yet it is material to attend to them. They have ever been the occasion of many seizures, and of many important trials and judicial decisions in relation thereto, and in which many interesting law questions have been decided and reported.

Acts of Congress of Dec. 22, 1807; Jan. 9, 1808.

§ 1. The act of December 22, 1807, merely laid an embargo "on all ships and vessels in the ports and places within the limits or jurisdiction of the United States, cleared or not cleared, bound to any foreign port or place," and forbade any clearance to be given &c.; and if any were allowed to sail with cargoes, (except by the President's special licence,) bonds were required, conditioned to reland such cargoes in some port of the United States, "dangers of the seas excepted." These last words, as will be seen, gave rise to several important decisions, where vessels giving such bonds, entered foreign ports, and there had their cargoes sold by compulsion of law, were allowed the excuse of the distress of weather, as coming within *the dangers of the seas*.

March 12, 1808; April 25, 1808; Jan. 9, 1809.

§ 2. Supplementary act of January 9, 1808. Sect. 3 enacted, "that if any ship or vessel shall" (continuing the embargo acts) "depart from any port of the United States, without a clearance or permit, or if any other vessel shall, contrary to the provisions of this act, or of the act to which this act is a supplement, proceed to a foreign port or place, or trade with or put on board of any other ship or vessel, any goods, wares, or merchandise, of foreign or domestic growth or manufacture, such ships or vessels, goods, wares, and merchandise, shall be wholly forfeited, and if the same shall not

Jan. 9, 1808.

**CH. 224.** be seized, the owner or owners, agent, freighter, or factors,  
**Art. 5.** of any such ship or vessel, shall, for every offence, forfeit and  
 ~~~~~ pay a sum equal to double the value of the ship or vessel and  
 cargo" &c. ;—by other expressions in the act, such property  
 was liable to be seized. By sect. 5, "if any foreign ship or  
 vessel shall, during the continuance of the act to which this  
 act is a supplement, take on board any specie, or any goods,  
 wares, or merchandise, other than the provisions and sea-  
 stores necessary for the voyage, such ship or vessel, and the  
 specie and cargo on board, shall be wholly forfeited, and may  
 be seized and condemned in any court of the United States  
 having competent jurisdiction." Sect. 6 enacted, "that all  
 penalties and forfeitures incurred by force of this act, shall be  
 sued for, recovered, and distributed and accounted for as by  
 said revenue act, passed March 2, 1799, and might be miti-  
 gated and remitted as by said act of March 3, 1797, art. 4.  
 sect. 1.

March 12,  
1808.

§ 3. By an additional act passed March 12, 1808, it is  
 enacted as to fines, penalties, and forfeitures, as in the said  
 sixth section of the said act of January 9, 1808.

April 25,  
1808.

§ 4. A further additional act, passed April 25, 1808, makes  
 further forfeitures of vessels, boats, and goods, and subjects  
 them to seizure in several other cases relating to neighbouring  
 colonies and ports, but on the same principles. And sect. 11  
 enacted, "that the collectors of the customs be, and they are  
 hereby respectively authorized to detain any vessel, ostensibly  
 bound with a cargo to some other port of the United States,  
 whenever, in their opinion, the intention is to violate or evade  
 any of the provisions of the act laying an embargo, until the  
 decision of the President of the United States be had there-  
 upon." Sect. 12 provides, "if any unusual deposits of pro-  
 visions, lumber, or other articles of domestic growth or manu-  
 facture, shall have been, or shall be made in any of the ports  
 of the United States, adjacent to the territories, colonies, or  
 provinces of a foreign nation, the collector of the district shall  
 be, and is hereby authorized to take the same in his custody,"  
 and hold them till bond given &c. Sect. 14 provides, as  
 above, for mitigating &c. fines &c. ; but adds, that all penal-  
 ties and forfeitures recovered in pursuance of this act, "in  
 consequence of any seizure made by the commander of any  
 public armed vessel of the United States, shall be distributed  
 according to the rules prescribed by the act, entitled, 'an act  
 for the government of the navy of the United States,'" and  
 other penalties &c. according to said revenue act.

May, 1808,  
Circuit Court  
in South Ca-  
rolina, Gilchrist & al. v. Theus, Collector.

§ 5. This court held, that the eleventh section above, vested  
 the discretion absolutely in the collector; and that this dis-

cretion could not be restrained by the President's instruction ; and therefore issued a *mandamus* to the collector in Charleston to clear a vessel to Baltimore, the collector himself being satisfied no violation of the embargo laws was intended, but felt himself restrained by such instructions, as he acknowledged in this answer to the motion of Gilchrist & al. for the said *mandamus*. CH. 224.  
Art. 5.

§ 6. In a long additional embargo act, passed January 9, Jan. 9, 1809. 1809, making many additional provisions, several further forfeitures were created, and seizures allowed, which will be noticed so far as material in the judicial decisions thereon ; as they are not important further than those decisions involve in them important principles.

§ 7. An embargo was laid, 1812, before the war ; and the April, 1812. act of Congress enacted, (among other things,) that " if any person shall, with intent to evade this law, export, or attempt to export, any specie, goods, wares, or merchandise, from the United States or territories thereof, either by land or water, such specie, goods, wares, and merchandise, together with the vessel, boat, raft, cart, waggon, sleigh, or other carriage, in which the same shall have been exported, or attempted to be exported, shall, together with the tackle, apparel, horses, mules, and oxen, be forfeited." This embargo and non-exportation act directed all fines, penalties, and forfeitures, to be recovered &c., mitigated &c., according to the provisions of the said revenue and mitigating acts above stated. This act also empowered the President or any person he should appoint, " to employ any part of the land or naval forces, or militia of the United States or the territories thereof, as may be judged necessary for the purpose of preventing the illegal departure of any ship or vessel, or any illegal exportation of any specie, or of any goods, wares, or merchandise, contrary to the provisions of this act, or of the last above mentioned act, (embargo just laid,) and for the purpose of detaining, taking possession of, and keeping in custody, any such ship or vessel, specie, goods, wares, or merchandise."

§ 8. This act also laid an embargo, and contained the provisions of that of 1812, as for forfeitures and seizures, and much extended in several cases. And among other matters, section 10 empowered collectors to seize and take into their custody any specie, goods, provisions, naval or military stores, or live stock found in any vessel, boat, or other water craft, " when there is reason to believe that they are entered for exportation, or when in vessels, carts, waggons, sleighs, or any other carriage, or in any manner, apparently on their way towards the territory of a foreign nation or the vicinity thereof, or towards a place whence such articles are intended to be Act of Congress of Dec. 17, 1813.



CH. 224. exported, or place in the possession of the enemies of the  
 Art. 6. United States," and to hold such articles till security given to  
 prevent their exportation &c. The collector was to exercise  
 this great power in connexion with the president's instructions.  
 Sect. 13 empowered the public and private armed vessels of  
 the United States to seize on the high seas or elsewhere, any  
 vessel that had violated this embargo law, and send it into the  
 United States for adjudication.

2 Roll. R.  
 211.

§ 9. Embargoes are of two kinds, *civil* or of *force*: *civil*  
 operates in home ports; of *force* operates in a foreign port,  
 where only one of force can be laid by another government  
 not of the place.

ART. 6. *Armed vessels illegally fitted out, liable to be for-  
 feited and seized.*

§ 1. As armaments illegally made are usually attended with  
 danger and heavy expenses, there generally can be no motives  
 for making them, but expectation of gain by seizing the pro-  
 perty of others in a forcible manner, or by selling them to  
 one power to be used against another, or against subjects  
 revolting, or by them against their parent state. The liberty  
 and enterprise of our citizens and their love of gain, long  
 have, do, and probably long will operate more powerfully in  
 this country than in any other to influence them to be con-  
 cerned in such armaments. Hence it was, our government  
 early found it necessary to enact strong laws to restrain them.

Act of Con-  
 gress of June  
 5, 1794;  
 made perpet-  
 ual, April 24,  
 1800.

§ 2. Congress passed this act to punish any citizen who  
 within the United States should "accept and exercise a com-  
 mission to serve a foreign prince or state in war by land or  
 sea," and for enlisting and entering himself, or for hiring and  
 retaining another person to enlist or enter himself, or to go  
 out of their limits with intent to be enlisted or entered in the  
 service of any foreign prince or state as a soldier, or as a  
 marine or seaman on board of any vessel of war, letter of  
 marque, or privateer. And sect. 3 enacted, "that if any per-  
 son within any of the ports, harbours, bays, rivers, or other  
 waters of the United, fit out and arm or attempt to fit out and  
 arm, or procure to be fitted out and armed, or shall knowingly  
 be concerned in the furnishing, fitting out, or arming of any  
 ship or vessel with intent that such ship or vessel be employed  
 in the service of any foreign prince or state, to cruise or commit  
 hostilities upon the subjects, citizens, or property of another  
 prince or state, with whom the United States are at peace;  
 or shall issue or deliver a commission within the territory or  
 jurisdiction of the United States, for any such ship or vessel,  
 to the intent that she may be employed as aforesaid; every  
 such person so offending shall, on conviction, be adjudged  
 guilty of a high misdemeanor, and shall be fined" &c. "And

CH. 224.

Art. 7.

every such ship or vessel with her tackle, apparel, and furniture, together with all materials, arms, ammunition, and stores, which may have been procured for the building and equipment thereof, shall be forfeited, one half" to the informer and half to the United States. Act also punishes by fine and imprisonment the increasing the force of an armed vessel to be used in such cases; also, setting on foot any military expedition in or from the United States. Sect. 1 enacts, "that the district courts shall take cognizance of complaints by whomsoever instituted, in cases of capture made within the waters of the United States, or within a marine league of the coast or shore thereof." Sect. 7 empowered the president to employ a military force to seize and detain any vessel "fitted out and armed, or attempted so to be fitted out or armed, or in which the force of any vessel of war, cruiser, or other armed vessel shall be increased or augmented, or in which any military expedition or enterprise shall be begun or set on foot contrary to the prohibitions and provisions of this act; and in every case of the capture of a ship or vessel within the jurisdiction or protection of the United States, as above defined, and in every case in which any process issuing out of any court of the United States, shall be resisted or disobeyed by any person or persons having the custody of any vessel of war, cruiser, or other armed vessel, of any foreign prince or state, or of the subjects or citizens of such prince or state," in order for holding such "ship or vessel with her prize or prizes, if any," and in order to execute this act and to restore such prizes when adjudged to be restored, and in order to prevent the "carrying on of any such expedition or enterprise from the territories of the United States, against the territories or dominions of a foreign prince or state with whom the United States are at peace."

ART. 7. *Judicial decisions as to seizures in revenue cases.*

§ 1. This was a libel of a cargo carried from Boston to Baltimore: 1st count was on the embargo act (abandoned:) 2, 3, 4, 5, & 6, under said collection law of March 2, 1799. The 7, 8, 9, 10, & 11th counts were under the non-importation acts of April 18, 1806, and December 19, 1806. The court decided solely on the 4th, framed on section 50th of said revenue act, and charged that the goods being of foreign growth and manufacture, and subject to pay the duties imposed by laws of the United States, between May 1, 1808, and filing the libel, were imported from some foreign port or place to the attorney unknown, into some port of the United States to him unknown, in a certain vessel to him unknown, and were afterwards, and before filing the libel, unladed from said last mentioned port from said vessel, without a permit from the proper officers of the customs of the last mentioned port.

7 Cranch, 339, Locke v. U. States, in error.—See revenue cases, Ch. 72, a. 3.

## Ch. 224.

## Art. 7.

Held 1 : This count is good, though objected the time and place of importation and the vessel in which imported were not stated in the information, but said to be unknown.

2d. *Probable cause* (mentioned sect. 71 in the collection law ; see a. 3. s. 11) means not *prima facie* evidence, but less than evidence which would justify condemnation. It imports a seizure made under circumstances which warrant suspicion ; and in all cases of seizure this is the meaning.

3d. Several facts exciting suspicion it was incumbent on Locke to prove the duties were paid, and as he did not, the seizure held legal, and goods condemned. 4 Cranch, 27, 28.

8 Wheat. R.  
232, United  
States v. 150  
Crates of  
Earthenware.

§ 2. Appeal from the District Court of Louisiana. The libel alleged the goods were exported from Bordeaux in France, and entered &c., and that they were invoiced at a less sum than the actual cost at the place of exportation, with design to evade the duties thereon, contrary to the provisions of section 66, of said collection law of 1799. Restitution decreed on the evidence as to the cost of the goods at Bourdeaux ; though originally from Liverpool, there could be no inquiry as to their value there, as that place was not mentioned in the libel.

7 Cranch,  
112. Whenton  
v. U States.  
—1 Wheat. 9.

§ 3. In this case the principle was clear, admitted, and held to be settled, that cases of seizures on waters navigable from the sea by vessels above ten tons burden, for breach of the laws of the United States, are civil causes of admiralty and maritime jurisdiction, and to be tried without a jury. See 3 Dallas, 297 ; 4 Cranch, 443 ; 5 Cranch, 281, all to the same purpose.

9 Cranch,  
104, Arnold  
v. U. States.

§ 4. Error to the Circuit Court for the District of Rhode Island : held, 1. The double duties imposed by the act of Congress passed July 1, 1812, to take effect from the passing of it, accrued on goods that arrived on that day within the collection district, (Pallen's case seems to be contrary :) 2. The duties do not attach on the vessel's arriving within the limits of the United States ; but they attach only when she arrives within the limits of some port of entry, not enough she arrives within the collection district : 3. If a bond be to pay a certain sum, or the duties as they shall be ascertained, the obligor has not an election to pay that sum : 4. He may be held to pay more than the penalty. Special plea stating the facts ;—that vessel arrived within the United States, June 30 ; within district of Providence July 1 ; that Providence is the sole port of entry in said district. That said goods were entered July 2d &c. As to the point, the duties accruing July 1st, and not the 2d, the authorities do not seem to have been well examined. But the case of the United States v. Nowell, 5 Cranch, 368, clearly shews the duties do not

accrue, in the fiscal sense of the word, "until the vessel arrives at her port of entry;" and of course there can be no forfeiture or seizure before such arrival. According to Reeves, 261, goods were legally seized in a ship twenty miles below the Hope, but within the limits of the port of London, such an arrival being viewed as an importation. This, for any thing that appears, was within the port of entry.

CH. 224.  
Art. 7.

§ 5. *Goods captured and seized, duties how accruing thereon.* This was an appeal from the Circuit Court, affirming that of the District Court in New York. Goods were shipped by Spanish neutrals on board of a British ship, captured sailing from Teneriffe to London, by an American private armed ship, and brought into New York. The goods were clearly neutral, and sold, pending the prize proceedings, by an interlocutory order of the District Court, and the money placed in the registry; property was decreed to be restored to the said Spanish claimants, but without payment of the duties. Affirmed in the Circuit Court. Affirmed in the Supreme Court as to restoration, but reversed as to the duties. And the court held, that "when goods are brought by a superior force, or by inevitable necessity, into the United States, they are not deemed to be so imported, in the sense of the law, as necessarily to attach the right of duties. If, however, such goods are afterwards sold or consumed in the country, or incorporated into the general mass of property, they become retroactively liable to the payment of duties. In the present case, if the goods had been specifically restored, and afterwards withdrawn from the United States by the claimants, they would have been exempted from duties; but having been sold by order of the court for the general benefit, the duties indissolubly attached, and ought to have been deducted from the proceeds by the courts below."

9 Cranch,  
387, Brig  
Concord.

*Smuggled goods condemned &c.* in the District Court,—and a search-warrant was issued by a justice of the peace to the sheriff &c. to search a dwelling-house for them. Held, the warrant must be legal on the face of it to justify the officer;—not when the description of the persons accused, or of the goods, is uncertain.

13 Mass. R.  
286, Sand-  
ford v. Ni-  
chols & al.

§ 6. The principle settled in the case was the same nearly as in the Concord's case. The prize act of June 26, 1812, and act of August 2, 1813, allowed a deduction of 33½ per cent. on "all goods captured from the enemy and made good prize of war, and brought into the United States." Decided, that under these acts are not included goods captured or seized, and brought in for adjudication, and after brought in, sold by order of court, and finally restored to a neutral claimant as his property;—but that these goods were liable to such

1 Wheaton's  
R. 171, 178,  
The Nereide,  
Feb. 1816.

CH. 224. duties as goods were imported in foreign vessels ; though these  
 Art. 8. goods were seized in an enemy's ship, yet, being the property  
 of a neutral, they never were lawful prize within the prize act ;  
 hence paid foreign duties, or none at all. These cases show  
 how important it was to neutrals, whose goods were so seized  
 and brought in, to prevent their being sold, and to take them  
 out of the country.

4 Cranch,  
 347, Peisch  
 v. Ware.

§ 7. *Goods saved from a ship wrecked, seized and libelled.*

Appeal from the Circuit Court of Delaware,—case from the District Court. The ship *Favourite* was wrecked in the Delaware Bay, and wine and spirits saved from the wreck, and landed ; held, they could not be forfeited or seized, because not accompanied with the marks and certificates the law required : nor 2. Because removed without the collector's consent, before the quantity and quality were ascertained, and duties paid : 3. *Quere*, if goods saved from a wreck are liable to duties : 4. The regulation of the revenue acts respect only regular importations, and not goods landed from vessels wrecked, or found, as in this case of the *Favourite*, in a ship afloat in a large bay, deserted by her crew, and not navigable : 5. The landing of these goods without a permit, and duties not paid, did not subject them to forfeiture or seizure, within the 50th section of the revenue or collection act of March 2, 1799 : 6. Nor the removal of them after landed within sect. 51 ; for in neither of these cases can the means be adopted the law prescribes for securing the revenue,—so on the principle stated, art. 2, s. 1, above.

Ch. 72. a. 3.  
 s. 1.

Seizure under sect. 66, act March 2, 1799, head, *Misfeasance &c.* in defrauding the revenue ; no seizure for duties after the law expired. See *United States v. Ship Helen*, 6 Cranch, 203.

9 Cranch,  
 289, Brig  
 Ann.

§ 8. Appeal from the Circuit Court for the district of Connecticut. Information against twelve casks of merchandise, part of her cargo, alleged to have been imported, or put on board, with intent to be imported, contrary to the act of March 1, 1809.

Held, if a collector seize for violating the revenue laws of the United States, and voluntarily abandon his seizure, the property is restored : before libel filed and allowed, the District Court has no jurisdiction of the case ;—has this but on a seizure continued ;—or if abandoned, but on a new seizure made ; or the thing is so situated, the court may make it.

ART. 8. *Judicial decisions as to seizures in embargo and non-intercourse, non-importation, and non-exportation cases.* Though the statutes in these cases are usually temporary, yet we find involved in the judicial decisions on them, some very important principles of law, especially in regard to the law of nations.

§ 1. Error to the Circuit Court of the District of Rhode Island. The cargo of the schooner *Paulina* was seized and libelled by the collector of the port of Newport, for the lading of it, between June 1, and July 31, 1808, in the night-season, without a permit from the collector &c., in violation of sect. 2 of said embargo act of April 25, 1808, and of sect. 50 of said collection act of March 2, 1799.

CH. 224.  
Art. 8.

7 Cranch, 52, *Paulina's cargo v. United States.*

Held, 1. Sect. 3 of said act of January 9, 1808, did not include a vessel lading in port, by means of river craft &c.: 2. That said second sect. did not require a permit to lade any vessel, nor authorize the forfeiture of one or cargo for lading without inspection of a revenue officer; the only penalty for such lading being the denial of a clearance. Count as to sect. 3, was added in the Circuit Court. All said sections cited in this case. Supreme Court issued a *dedimus* to take depositions in Rhode Island. Vessel and cargo acquitted. The court certified there was *probable cause* of seizure.

§ 2. Appeal from the Circuit Court of the District of Connecticut;—affirming the condemnation of the sloop *Active* and cargo, in the District Court. The points in the Supreme Court decided were, 1. The departure of a vessel from a wharf in a port, and sailing  $1\frac{1}{2}$  miles, intending to go to sea, was not a departure from the port within said sect. 3 of said act, January 9, 1808, where she had not, when seized, actually gone out of the port, (New London :) 2. A licensed fishing vessel was liable to forfeiture under sect. 32d, act Feb. 18, 1793, for enrolling &c. vessels, for sailing laden with goods, intended to be carried to another place, without a license, though they were of domestic growth and manufacture, and not liable to any duty: 3. But such cargo is not liable to forfeiture, except it belong to the master, owner, or a mariner of the vessel. This vessel was seized in the act of leaving the port without a license or permit, and was loaded in the night;—was reason to suspect she was intended for a foreign port;—not seizable under said 3d sect. because seized in port, and “a departure from port without a clearance, was necessary to consummate the offence.” Acquitted as to so much of the cargo as one Gates owned, not being master, owner, or mariner of the vessel;—residue of the cargo and vessel condemned,—certified there was *probable cause* of seizure. Prosecutions under the non-intercourse act are causes of admiralty and maritime jurisdiction, and the proceeding may be by libel &c.

7 Cranch, 98, *Sloop Active v. United States.*

1 Wheat. 9, *The Samuel.*

§ 3. The brig *Eliza* was seized by the collector of the district of Delaware, for having proceeded to the Havanna in violation of said 3d sect. act January 9, 1808, and for exporting from the United States sundry goods &c., contrary to

7 Cranch, 113, *United States v. Brig Eliza.*

Cx. 224. sect. 4, act March 12, 1808. Held, 1. She was liable to be seized on her return; though that act gave double her value as a penalty in case not seized. These sections are cited.  
*Art. 8.*

7 Cranch,  
 366, Brig  
 Penobscot  
 v. United  
 States.

§ 4. This was a case on the non-intercourse act of March 1, 1809; May 1, 1810; President's proclamation of November 2, 1810, and act March 2, 1811; and an appeal from the Circuit Court of the District of Georgia, affirming that of the District Court, condemning said brig and cargo of salt, for violating said act. Held, that under these laws, forbidding importations from Great Britain or Ireland, or any colonies or dependencies of Great Britain, a vessel had no right, March, 1811, to come into the waters of the United States to inquire if she might land her cargo legally.

7 Cranch,  
 363, Schoon-  
 er Jane v.  
 United  
 States.

§ 5. This was a seizure of the Jane and cargo, between October 1st and 18th, 1809, in Maryland, for violating the non-intercourse act in relation to Great Britain and France, and dependencies, and for importing coffee from St. Domingo a dependency of France. District Court dismissed the information, because the evidence did not positively identify the vessel. On appeal, the Circuit Court reversed the decree, and condemned vessel and cargo; and condemnation affirmed in the Supreme Court, on the ground that in a prosecution against a vessel for violating a law of the United States, it is not necessary to adduce positive proof of the identity of the vessel. There was much circumstantial testimony, she came from St. Domingo to Baltimore.

7 Cranch,  
 389, Schoon-  
 er Hoppet &  
 Cargo v.  
 United  
 States.

§ 6. Appeal from the District Court of Orleans, condemning vessel and cargo as forfeited under the act of March 1, 1809, as to Great Britain and France, and dependencies. The 4th sect. made it unlawful "to import into the United States or the territories thereof, from any foreign port or place whatever, any goods, wares, or merchandise whatever, being of the growth, produce, or manufacture of France, or of any of her colonies or dependencies," or of any country in the possession of France. Sect. 5 enacted, "that whenever any article or articles, the importation of which is prohibited by this act, shall, after the 20th of May, be imported into the United States or territories thereof, contrary to the true intent and meaning of this act, such articles, as well as other articles on board the same ship or vessel, belonging to the owner of such prohibited articles, shall be forfeited." Sect. 6th enacted, "that if any article or articles, the importation of which is prohibited by this act, shall, after the 20th of May, be put on board of any ship or vessel," "with intention to import the same into the United States or the territories thereof, contrary to the true intent and meaning of this act, and with the knowledge of the owner or master of such ship or

CH. 224.  
Art. 8.

vessel," "such ship or vessel shall be forfeited." It was not alleged in the informations there was such knowledge; nor did that against the cargo state that such of the goods as were not prohibited, belonged to the owner of the prohibited goods; but the information against the vessel, as also that against the cargo, averred generally that the goods were imported contrary to said 4th, 5th, and 6th articles of the act. Held 1. In proceedings in courts of law *in rem* or *in personam*, for penalties and forfeitures, "the allegation the act charged was committed in violation of law, or of the provisions of a particular statute, will not justify condemnation, unless independent of this allegation a case be stated which shows that the law has been violated: 2. That this principle applies "by the free genius of our institutions, in all prosecutions for offences against the laws:" 3. This principle applies, in substance, in courts of admiralty trying offences against municipal law: and 4. In courts of admiralty generally; for it is "a maxim of the civil law that a decree must be *secundum allegata*, as well as *secundum probata*," a maxim essential to the due administration of justice in all courts, (several good reasons stated;) libels bad as to the vessel and goods, not alleged to be of the growth &c. of Great Britain or France &c., whatever the fact may be: 5. Certain wines were imported in this vessel, alleged to be of the growth &c. of France, these were exported from the United States to St. Bartholomews, and there purchased by the consignee, a merchant of that island, and thence exported to New Orleans during said act, (though first imported into the United States before the non-intercourse act.) Held, they were liable to forfeiture and seizure under said act.

§ 7. But in this appeal from the sentence of the Circuit Court (South Carolina,) condemning said schooner for violating the non-intercourse act of March 1, 1809, it was held, that a libel may be amended after reversal, for want of substantial averments: 2. That a libel must aver specially all the facts which constitute the offence: 3. That this act was in force between February 21, and March 2, 1811, by virtue of the President's proclamation of November 2, 1810.

7 Cranch,  
570, Schooner  
Anne v. U.  
States.

The non-intercourse act of June 13, 1798, did not disable a United States' vessel sold *bona fide* to a foreigner residing abroad while the act existed.

3 Cranch,  
499, Sands v.  
Knox.

§ 8. Was an appeal from the Circuit Court in Massachusetts condemning this brig for violating the non-intercourse act of June 28, 1809, by going with a cargo of domestic goods to a prohibited port. The claim alleged she was duly cleared at Portsmouth for Charleston, S. C., and sailed accordingly, but by violence of winds and waves was driven out of her course, and became so much damaged that she could not pro-

9 Cranch, 71,  
Brig Struggle  
v. U. States.



CH. 224. proceed on to Charleston, but for the preservation of vessel and  
 Art. 8. cargo and the lives of the crew it was necessary to sail for the  
 West Indies; that she accordingly sailed to Martinico, then to  
 St. Bartholomews. The real question was, if the statement  
 in the claim was true, and so a question of fact the District  
 Court first tried by witnesses; but the point decided in the  
 Supreme Court meriting attention was, that in such a case a  
 party excusing a breach of a penal act ought to prove the  
*vis major*, he pleads, so as to leave no reasonable doubt of his  
 innocence. This naturally results from his plea, admitting the  
 violation of such law, but for the excuse he sets up. 2. Cir-  
 cumstances may sometimes outweigh positive testimony. Con-  
 demnation affirmed. See 1 Wheaton's R. 20, like excuse  
 set up.

9 Cranch,  
 102, 104, The  
 Ship Rich-  
 mond v. U.  
 States.

§ 9. Appeal from the district of Georgia. Vessel condemn-  
 ed for violating said act of June 28, 1809, non-intercourse,  
 by departing from Philadelphia to a permitted port, without  
 giving bond not to go to a prohibited port. The material points  
 decided in the Supreme Court were: 1. That this act which  
 required such bond was applicable to a vessel in ballast: 2. If  
 a merchant vessel of the United States be seized by their  
 naval forces within the territorial limits or jurisdiction of a  
 foreign friendly nation for a violation of the law of the United  
 States, it is an offence against that nation: 3. But this matter  
 of offence must be adjusted by the two governments: 4. This  
 court cannot take cognizance of it: 5. The law does not  
 connect that offence with the seizure afterwards made by the  
 civil authority, under the process of the District Court, so as  
 to make its proceedings void against the vessel.

1 Wheat. 261,  
 The Edward.

§ 10. Appeal from the Circuit Court (Massachusetts.)  
 The offence charged was, that the ship Edward, Feb. 12,  
 1810, sailed from Savannah with a cargo to a foreign interdict-  
 ed port without a clearance, and without giving bond on said  
 act of June 28, 1809;—claim denied she departed from Sa-  
 vannah bound to a foreign port in manner and form stated in  
 the information. District Court condemned her. An appeal  
 to the Circuit Court,—that allowed the district attorney to  
 amend the libel by filing a new allegation, that Liverpool in  
 Great Britain was the foreign port to which bound. This  
 amendment was approved by the Supreme Court. Held,  
 also, under section 3d of said act, every vessel bound to a  
 foreign *permitted* port was obliged to give bond with condition  
 not to go to a *prohibited* port, and not to trade with such;—  
 also, if the evidence is sufficient to show a breach of the law,  
 but the information is not sufficiently certain to authorize a  
 decree, the Supreme Court will remand the cause to the  
 Circuit Court, with directions to allow the information to be

amended ; the amendment contemplated was to insert Charleston instead of Savannah. Dates and substance of the British orders in council, the French decrees, and the consequent acts of our government. CH. 224.  
Art. 8.

§ 11. Appeal from the Circuit Court of South Carolina. Libel on the non-importation laws against the ship *Diana* and cargo,—condemned. The rule of damages settled was to compute at the rate of six per cent. on the appraised value of the cargo, including interest from the date of the decree of condemnation in the District Court. 3 Wheat. R.  
58, The  
Diana.

§ 12. This was a libel under the non-importation acts. Excuse alleged was distress of weather. This repelled, and condemnation decreed by four judges against three,—was a mere question of evidence, if it proved the excuse set up. 3 Wheat. R.  
39, The New  
York.

§ 13. This was an appeal from the Circuit Court of the District of Massachusetts. The principles of the case and of the decision were the same as in the case of the ship *New York*. 3 Wheat. R.  
392, The *Æo-*  
*lus*.

§ 14. When an embargo bond was forfeited and sued, held the penalty belonged to the executor of the obligee, and not to the succeeding officer. *Jones v. Shore's exrs.*, case of removal ; 4 Wheat. 74, 76, *Van Ness v. Buel*. 1 Wheat. R.  
462.

§ 15. Error on a judgment rendered by the Supreme Court of Rhode Island. *Slocum*, surveyor of the customs for the port of Newport, seized the *Venus* and her cargo in that port bound to some other port in the United States. *Mayberry &c.*, the owners, replevied the property in the State court. Plea, loaded in the night, not under the inspection of the proper revenue officers ; and that the collector, suspecting an intention to violate the embargo laws, had directed him to seize and detain her till the opinion of the President should be made known in the case, and concluded to the jurisdiction of the court ; same matter also was pleaded in bar. Plt. demurred to both pleas in the State court and joinder. Judgment in it for the plt. ; and the cause was removed into the Supreme Court of the United States by a writ of error. Seizure was on the 11th section of the embargo law of April 25, 1808. Held, 1. "The judiciary act gives to the Federal courts exclusive cognizance of all seizures made on land and water ; hence, this intervention of the State court was a violation of the act, and the Federal court had a right to enforce a redelivery to *Slocum*, by attachment, or other summary process against the party who took the possession from him : 2. It depended solely on the final decree of the Federal courts, whether this seizure was legal or tortious : 3. If *Slocum* had refused to libel to assert the forfeiture, the District Court might, on application of *Mayberry*, have compelled him to libel &c. or to abandon the seizure : 4. If this be finally adjudged 2 Wheat. R.  
*Slocum v.*  
*Mayberry*.

CH. 224. illegal, and without reasonable cause, the said owners may  
 Art. 4. proceed at common law, or in the admiralty for damages for  
 the illegal seizure : but 5. If at common, then only in the  
 State courts at first, and through them to the Federal courts, if  
 to them at all, as they have no jurisdiction to decide on the  
 conduct of United States officers in the execution of their  
 laws in suits at common law, but in this way : 6. Held also,  
 that no power was given to the officer by said section to detain  
 the cargo if separated from the vessel ; but that the owners  
 had a right to take it out of her and dispose of it in any way  
 not prohibited by law : and 7. And if detained, to replevy it  
 in the State court : 8. This section respected only the vessel,  
 not the cargo separated from her : 9. But as the vessel was  
 detained under a Federal statute, the proceedings as to her  
 could not have been in the State court. As to the cargo, the  
 State court did not misconstrue any Federal law.

Wheat. R.  
 18, Otis v.  
 Walter.

§ 16. Error to the Supreme Judicial Court of the State of  
 Massachusetts. Was an action of trover brought in the State  
 court, in which Walter recovered of Otis, (def. in it) damages  
 for his converting the cargo of the Ten Sisters. Otis, collec-  
 tor of the port of Barnstable, had detained the vessel under  
 suspicion of an intention to violate the embargo laws, particu-  
 larly the act of April 25, 1808, sect. 6 and 11. She sailed  
 from Ipswich with a cargo of flour, tar, and rice, in order to  
 carry the same to Barnstable, or to a place called *Bass River*  
*in Yarmouth*, and proceeded to Hyannis, in the collection  
 district of Barnstable ; on her arrival there the master applied  
 to the collector for a permit to land the cargo ; this was refus-  
 ed by Otis, who soon after seized the vessel and cargo under  
 said acts. This was given in evidence in defence, on the  
 general issue in the State court, and the Chief Justice in-  
 structed the jury, " that the said several matters and things so  
 allowed and proved, were not sufficient to bar the plt. of his  
 action" &c. Verdict and judgment for the plt. The ques-  
 tion of fact in the Supreme Court of the United States, which  
 reversed this judgment below, seems to have been, whether the  
 master was at the end of his voyage, and so fairly applied for  
 permit to unlade, or whether he meant to go further to some  
 other port ; and so this application for the permit was a mere  
 pretence to cover an intention to evade the embargo laws. It  
 seems, the State court and jury thought it fair and honest, but  
 the Federal court deemed it fraudulent and mere pretence.  
 Judge Johnson in delivering the opinion of the Federal court,  
 stated further, that no clearance was in evidence ; that Ipswich  
 was to the north of the peninsula, which terminates in Cape  
 Cod. The port or bay of Barnstable was on the north side  
 of that peninsula ; Bass River and Hyannis Bay on the south ;

all known as distinct places, but all lying within the county and collection district of Barnstable; and though Hyannis Bay lies in said district, yet to reach it in sailing from Ipswich, you must pass both the town of Barnstable and the mouth of Bass River. It does not appear how these geographical facts came into the case, perhaps the judge stated them of his own knowledge. The court held, 1. It is not necessary (as already decided) to show probable cause for the seizure: 2. That the law confided in the collector's discretion, and this, in itself, is a sufficient justification, "when the discharge of duty is the real motive, and not the pretext, for detention:" 3. But the law relates only to vessels, ostensibly, bound to some port in the United States: 4. A seizure is unjustifiable after the termination of a voyage: 5. And "no further detention of the cargo is lawful than what is necessarily dependent upon the detention of the vessel: 6. It is not essential to the termination of a voyage that the vessel arrive at the terminus of her original destination; but it may be by stranding, stress of weather, &c.: 7. If a vessel, not actually arriving at her destined port, excites honest suspicion in the collector's mind, that the master's demand of a permit to land her cargo was merely colourable, this is not an end of the voyage so as to preclude the right of seizure and detention: 8. As her destination was expressly to Barnstable or Bass River in Yarmouth, "her arrival at one or the other of those places was indispensable to the termination of her voyage," supposing, in fact, to have had no ulterior destination: 9. As a destination may be colourable, if at the termination of her voyage or not, was "a question which ought to be left in the instruction of the court, open to the jury." It seems it was not left open in the State court as that charge was as above, and also charged that said matter did not "constitute or amount to any defence whatever in the action." Perhaps it is on this single point only we can discern the reasons of this reversal. It is doubtful if there was any real ground of suspicion, but the want of a clearance from Ipswich, and this the master may have had for any thing that appears; it only appears he did not mention it in giving his testimony, and none was found that appears. As to the situation of the vessel at Hyannis but little can be inferred, and in *Otis v. Bacon*, was deemed not material. Next case.

§ 17. This was error in a like case, and the Supreme Court of the Union held, sect. 11th of said embargo act of April 25, 1808, gave the collector no right to seize and detain a vessel and her cargo, after she had arrived at her destined port, under a suspicion she intended to violate said law. 2. That such detention could not be justified by instructions from the

CH. 224.

Art. 8.

1 Wheaton, 583, *Otis v. Walter*, in error. The State judgment was again for *Walter*. On remanding the cause, error brought and second State judgment reversed. It now appeared the vessel was cleared for the port of Yarmouth only.

7 Cranch, 589, *Otis v. Bacon*.

CH. 224.

Art. 8.



Secretary of the Treasury, nor by the President's confirmation. State judgment against the collector, Otis, was affirmed. See this case reported in the State court, Ch. 144, a. 14, s. 21; Ch. 189, a. 4, as to debt on the bond to prosecute and interest on a review. As to these two cases, *Otis v. Walter*, and *Otis v. Bacon*, one material difference was, in *Otis v. Bacon*, the collector, before he seized, actually gave Bacon a permit to land his cargo. This was properly viewed as the collector's concession the voyage was terminated. Another material difference, in *Otis v. Bacon*, there was not such a positive charge by the State court to the jury that the deft's. plea was no defence whatever in the action; but as above there was such a charge in *Otis v. Walter*. As to place, in *Otis v. Bacon*, the destined port was Barnstable, clearance for Yarmouth, but Bacon's vessel arrived at Mud Hole in Hyannis Bay; so no material difference. However in *Otis v. Bacon*, the vessel came from Baltimore with flour, permitted to be imported, and stopped at Mud Hole, six miles northwest of Bass River, and William Otis, the deputy collector, who made the seizure, said to Bacon, "I have got your vessel, and I will keep her." Bacon then abandoned the property to Wm. Otis, *plt. in error*. and made a protest and abandonment before a notary public. Bacon, also, brought trover in the State court, against Jos. Otis, the collector, who died pending the suit; and W. Otis, administrator, was admitted. There, on the whole, can be no doubt but that the different decisions of the Federal court in these two cases were justified by these differences, especially, the permit actually given, and said charge to the jury. Bills of exceptions to the charges, and error brought on sect. 25 judiciary act of Sept. 24, 1789; and the general question above was, if the court below erred in its construction of the said eleventh section. It will be observed this cause was carried to the Federal court on a bill of exceptions to the charge of a single judge, at a *nisi prius* court. And the Federal court said it had no concern in the decisions of the State court, further than that court misconstrued, and improperly decided, against the "validity of the constitution, treaties, statutes, commissions, or authorities in dispute."

2 Wheaton's  
R. 132, The  
San Pedro.

§ 18. This was a case of a seizure at Mobile by the collector for breach (Feb. 1813,) of the embargo act of Dec. 22, 1807 and additional acts, of the non-intercourse act of March 1, 1809, and of the laws of the United States, (voyage from Mobile to Jamaica,) and bringing goods &c. May, 1813: 3. Sundry goods &c. were "intended to be imported" in the San Pedro from Jamaica to Mobile in violation of the non-intercourse act &c. In this case several questions were discussed, but the material point decided was, that under the judiciary act

of 1789, Sept. 24, ch. 20, and act of March 3, 1803, ch. 93, causes of admiralty and maritime jurisdiction, or in equity, cannot be removed by writ of error from the Circuit Court for re-examination in the Supreme Court, but must be by appeal. This was a writ of error to the Superior Court in the Mississippi Territory, by appeal under 19th section, sect. 22 of said act of 1789, and sect. 2 of said act of 1803. This act provides that from all final judgments or decrees, in a Circuit Court, in cases of equity, of admiralty, and maritime jurisdiction, and prize or no prize, an appeal shall be allowed to the Supreme Court; that a transcript of the libel, bill, answers, depositions, and other proceedings in the cause, shall be transmitted to the Supreme Court; and no new evidence shall be admitted, on such appeal, except in admiralty and prize causes. This act then provides, that such appeals shall be subject to the same rules, regulations, and restrictions as are prescribed by law in cases of writs of error, and repeals so much of said 19th and 20th sections as comes within the purview of said act of 1803. This act removes, by appeal, exactly what it ought to remove in these three kinds of cases, that is, the facts and conclusions from evidence, as well as the decree and law; but a writ of error removes only the record, and law of the case seen in the record. This is proper in common law cases, and in them only; the inferior court in said three civil law cases, may as often err in its conclusions of fact of evidence, as in its conclusions of law, from the facts; hence both removed but by appeal. By said act of 1789, both were removed by a writ of error; so was the practice. On each act the Supreme Court had the matters to decide upon, but by different processes, by error on one, appeal on the other. The mode of removal by error in the act of 1789 is repealed by act of 1803, and this mode only, the removal by appeal, repealed that by error; hence the appellate jurisdiction of the Supreme Court was by this act of 1803 placed on its true ground, the old settled principles of judicial proceedings. So now the writ of error very properly remains in common law cases, and in them only; and submits to the revision of the Supreme Court the law only arising out of the record, and that only: whereas, very properly, in admiralty and equity cases, it revises the facts as well as the law, and corrects conclusions from evidence. This case agrees with the record of the United States *v.* Hooe; that was an appeal, though in 3 Cranch, 73, misreported error. Probable cause certified 3 Wheaton, 78, in the San Pedro's case.

Сн. 224.  
Art. 8.

Commentary.

§ 18. *Other seizures in embargo and non-intercourse cases, stated, Murray v. Charming Betsey, non-intercourse case, Ch.*

CH. 224. 227, s. 52, 58 ; *Little v. Barrime*, non-intercourse case, Ch. Art. 9. 227, s. 51 ; *United States v. Schooner Betsey and Charlotte*, Ch. 186, a. 9, s. 8, a. 11, s. 4, non-intercourse, seized on a river &c. ; *United States v. Hall*, Embargo, Ch. 40, a. 21, s. 7 ; *Schooner Rachael v. United States*, non-intercourse case, and law expired. An American vessel in 1799 was forced by distress into a French port, and obliged to unload to repair, and was prevented by the government there, from relading her original cargo, or from taking any thing in exchange but produce or bills. Held, she might purchase and take away such produce. 3 Cranch, 210, *Hallet v. Jenks*.

7 Cranch, 382.

The legislature may make the revival of a statute, as the non-intercourse act of March 1, 1809, depend on a future contingency to be declared by the President's proclamation :—revives in the very state in which it expired.

6 Cranch, 327, *The Juliana v. U. S.*

§ 19. Appeal from the Circuit Court of the district of Maryland ; seizure in Baltimore for violating the 3d section of the said embargo act of Jan. 9, 1808, for putting goods from the *Juliana* on board the *Alligator* ; and decided that it was no offence, unless the act was done with an intent to export them, and such intent not being stated in the libel, the offence contemplated in the act was omitted ;—other defects in it.

7 Cranch, 22, *James Wells, a brig v. U. States* ; also 107.

§ 20. Appeal from the Circuit Court in Connecticut, vessel and cargo seized for violating said 3d section of said act of Jan. 1808, in making a voyage to St. Bartholomews, under a clearance to St. Mary's ; excuse pleaded was stress of weather. On this point the court held, 1. That the evidence of such necessity to excuse violating the embargo laws must be very clear and positive : 2. In cases of admiralty jurisdiction, new evidence will be admitted in the Supreme Court, and for such purpose a commission will issue.

2 Wheaton's R. 148, *The William King*.

§ 21. This vessel was seized for a breach of the embargo acts. Held, if a vessel was, actually and *bonâ fide*, carried by force, to a foreign port, she was not liable to forfeiture ; but if it appear the alleged compulsion was fictitious and collusive, there was a forfeiture and liability to seizure ;—mere question of fact ; the same in cases of the *Bothnea* and *Jahnstoff*. 2 Wheaton's R. 169, 177. If vessels collusively, cause themselves to be captured in war, but the captors are fair, they have the prizes, and not the government, for a breach of a non-importation act

*Bothnea, &c.*

Wheaton on Captures, 203 to 227, as to trading with the enemy.—And Marten's Law of Nations, 265 to 271.

ART. 9. *Seizures for trading with an enemy, using his licenses, &c.* The courts in England and in the United States have of late years been very much engaged in checking commerce and trade with an enemy, and especially the use of his licenses. Several cases, in considering captures, insurance involving in them these subjects, have been, and will be noticed ; espe-

cially *Bell v. Gelson*, and *Potts v. Bell*, Ch. 40, a. 2, s. 15; Ch. 224. and several other cases, Ch. 40, a. 3, s. 1 to 6; Ch. 144, a. 3, Art. 9. s. 4; *Church v. Hubbard*, Ch. 186, a. 11, s. 12; Ch. 40, a. 6, s. 20; *Rose v. Himely*, Ch. 186, a. 9, s. 12, 14; *Hudson v. Guestier*, Ch. 183, a. 6, s. 15. See also, 1 Rob. R. 165; 3 Rob. R. 37, 49, 2d Am. ed.; 4 Rob. R. 206, Am. ed.

§ 1. *What is a foreign vessel, and enemy's if a war &c.* Appeal from the Circuit Court in Maryland, condemning the schooner *Good Catharine* as a foreign vessel, for violating section 5 of said embargo act of January 9, 1808, enacting, "that if any foreign ship or vessel, shall take on board any specie, or any goods, wares, or merchandise, other than the provisions and sea-stores necessary for the voyage, such ship or vessel, and the specie and cargo on board shall be wholly forfeited." She was originally an American vessel, but had been captured and condemned as prize, and purchased by *Hurst*, her former master, an American citizen. She took on board goods not allowed by the act, "and cleared out as a *Dane*," and had a Danish burgher's brief, the master got to prove she was a foreign vessel. Adjudged a foreign vessel, though urged she was in fact American, and the owner might prove the truth of the case, as in criminal cases there can be no *estoppel*.

7 Cranch,  
349. *Schooner  
Good  
Catharine v.  
U. States.*—  
8 Cranch,  
110.

§ 2. *Enemy's license.* Appeal from the Circuit Court in Massachusetts; and the *Alexander* seized and condemned for sailing under a British license in the war of 1812. This vessel was owned by citizens of the United States, and sailed for them from Naples in 1812, with a cargo and said license to carry it to England. On her passage heard of the war, and altered her course for England, was captured by the British, carried into Ireland, libelled, and acquitted upon her license, sold her cargo, and after a detention for seven months in Ireland, purchased a return cargo in Liverpool, sailed for the United States, and was captured by a United States privateer. Vessel and cargo condemned as prize to the captors. United States also claimed both as forfeited, under the non-importation act;—condemnation also for trading with the enemy. Like appeal and case of an enemy's license; and held, that if a vessel sail under such license of protection in furtherance of his views or interest, such sailing is illegal, and subjects the vessel and cargo to seizure and confiscation as enemy's property. Admiral *Sawyer's* license was found on board, granted on the recommendation of *Andrew Allen jun.*, the British consul. The paper stated the owner of the *Julia*, a merchant of Boston, was "well inclined towards the British interest, who is desirous of sending provisions to Spain and Portugal for the use of the allied armies in the peninsula."

8 Cranch,  
169, 184, *The  
Alexander.*—  
*Wheaton on  
Captures,*  
158 to 170,  
as to licenses.

8 Cranch,  
181, 203, *The  
Julia.*



Ch. 224. The capture was by the United States' frigate *Chesapeake*,  
*Art. 9.* December 31, 1812. The court said, to purchase a license from the enemy directly or indirectly, is to trade with him; and that it made no difference whether the flour came to his use indirectly through the neutral port of Lisbon, or directly, it was a traffic with him, and aiding his views and interest. See this subject ably considered, p. 189 to 205. And it was correctly observed, that "the peculiar terms of this license" afforded "irrefragable proof of an illicit intercourse with the enemy, and a direct contract to transport the cargo for the use of the British armies in Spain and Portugal."

8 Cranch,  
 203, 221, *The*  
*Aurora*, Pike  
 master.

§ 3. This was an appeal from the Circuit Court for the District of Rhode Island. An American vessel in the war of 1812, bound from Norfolk with a cargo of bread, flour, &c. ostensibly for St. Bartholomews, a neutral island, was, November 26, 1812, captured, with a British license on board, by an American privateer. This license allowed her to carry provisions, lumber, &c. to the British islands in the West Indies, supplies to which were important to the English. This license too was granted in furtherance of the views of the British government. The decision (as to be expected) was the same as in the *Julia's* case. And further held, it is not necessary in order to subject the property to confiscation the person granting the license be empowered to do it, if the grantee take it expecting it will protect his property from the enemy;—also, that sailing with intention to promote the enemy's views is sufficient to subject the property to seizure and condemnation, although that intention be defeated by capture. Many cases and authorities cited in these cases.

8 Cranch,  
 444, 451, *The*  
*Hiram*.

§ 4. The *Hiram* was owned by an American citizen, and sailed from Baltimore in September 1812, with a cargo of flour and bread on a voyage to Lisbon, captured by a privateer and sent into Marblehead, and she had on board a British license or protection, purchased of an American citizen, also the owner's letter directing remittance to England. Acquitted in the district and circuit courts. Decree reversed, and vessel and cargo condemned to the captors as prize of war. Two principles recognised the above, the voyage was in furtherance of the enemy's views, and under his protection: 2. Sailing so protected with a cargo of provisions to a neutral port, the enemy's ally in his war with a third power, is such a furtherance of the enemy's views.

8 Cranch,  
 253 to 317,  
*The Venus*,  
 Rae master.

§ 5. *Enemy's license: what is a domicil in his country: what are enemy's goods, &c.*

Appeal from the Circuit Court in Massachusetts. In this case the vessel sailed from England with a cargo claimed by the respondents, July 4, 1812, under a British license, for New

CH. 224.  
Art. 9.

York, and was captured August 6, 1812, by an America privateer; part of the cargo was claimed by Lenox & Maitland; part by Jonathan Amory, as the joint property of James Lenox, William Maitland, and Alexander M'Gregor; part by M'Gregor alone; and twenty-one trunks of goods by James Magee of New York, as the joint property of himself and John S. Jones, residing in England. In this case, the report of which occupies above sixty pages, the Supreme Court held, 1. If a citizen of the United States fix his domicil in a foreign country, between which and them a war takes place afterwards, any property shipped by him before he knows of the war, and in it is captured by a United States cruiser, must be condemned as good prize; because this citizen remaining as above domiciled in the enemy's country, must be viewed as settled there and as an enemy, though after the capture he expresses a wish to return: 2. On a shipment of goods to be sold on joint account of the shipper and consignee, or of the shipper alone, at the consignee's election, the property does not vest in him, until he makes his election under the option given him: 3. If two merchants, partners, jointly own a commercial house in New York, and one gets an American register for a ship, by swearing he with his partner of the city of New York, merchant, are the sole owners of her, when in fact his partner is domiciled in England, the ship is liable to forfeiture and seizure under the act of Congress of December 31, 1792. As to M'Gregor, Maitland, and Jones, they were native British subjects, but came to the United States long before the war of 1812, and in due time were naturalized. Long prior to this war they returned to England, and there fixed themselves in trade, and were settled in it there when said shipments were made, and when the capture was made. Maitland remained there, but bearing of the capture expressed a wish to return to the United States, but was prevented by several causes he stated in his affidavit. M'Gregor returned to the United States in May 1813; Jones remained in England. Vattel's definition of a domicil is material, and perhaps the true one. It is, he says, "a habitation fixed in any place with an intention of always staying there;" but he must "sufficiently make known his intention of fixing there, either tacitly or by an express declaration."

Johnson J. declined giving an opinion. Marshall C. J. dissented on the first point; his reasons, p. 288 to 317. Livingston J. concurred in opinion with the Chief Justice.

§ 6. *Domicil—how on this the right to seize depends.* As where a friend or neutral has his domicil in the enemy's country &c.

## CH. 224.

## Art. 9.

8 Cranch,  
363, The  
Frances,  
Boyer, mas-  
ter, 348, 354.  
—Same case,  
3 Cranch,  
209. —  
9 Cranch,  
219.

Appeal from the Circuit Court in Rhode Island, condemning certain goods shipped at Glasgow by Colin Gillespie, the claimant, who had been naturalized in the United States, and consigned to A and B for sale and remittance to the shipper at Glasgow. They were captured by an American privateer. And there was no doubt but that the commercial domicil of a merchant, when his goods are captured or seized, decides their character hostile or neutral. It appeared Gillespie owned the goods when shipped; that he was a native of Great Britain, and came to the United States in 1793, and was naturalized in 1798; having in 1794 and 1796, returned to Great Britain on mercantile business, and revisited the United States in 1795 and 1797; again went to Great Britain in 1799, there married, and revisited the United States with his wife in 1799, and continued in New York until June 1802;—again went to Great Britain and resided there till November 1805, when he came again to the United States, (his wife having died in Scotland,) and formed a partnership with John Graham of New York; and returned to Glasgow in 1805, where he carried on the business of the partnership, under the firm of Colin Gillespie & Co., and there remained till the partnership was dissolved, and till July 2, 1813, on which day he left the enemy's country and came to the United States with his family, and arrived in October 1813. He kept house at Glasgow, and built a warehouse there, which he owned when the cause was heard, and kept his counting-house in it. He deposed, that he resolved to come to the United States, on being informed of the war declared in them June 18, 1812, and known in England about the 20th of July 1812, but was prevented coming by commercial engagements until the time above stated, then leaving some of his affairs not arranged. His property was condemned. Hence held, he was domiciled in Great Britain when it was captured, very early in the war. Was an order for farther proof. Held, an Englishman born, domiciled in the United States at peace with England, might lawfully exercise the privilege of the United States in trade with Denmark, at peace with them, though at war with England. 1 Maule & Sel. R. 726.

8 Cranch,  
435, The St.  
Lawrence,  
Webb, mas-  
ter.

§ 7. *What is trading with an enemy &c.*—Appeal from the Circuit Court in New Hampshire. The ship St. Lawrence, owned in New York and Baltimore, arrived at Liverpool from Sweden, in April, 1813, with a cargo of iron and deals. In May the owner's agent contracted for her sale to a house in Liverpool; the contract to be ratified or disaffirmed by her owners; and they to execute the bill of sale, if affirmed, to Ogden and Heard in New York, or either of them. May 5, 1813, a license was granted by the British privy

council, to Thomas White, of London, and others, to export direct to the United States, an enumerated cargo in the St. Lawrence, provided she cleared out before the last of the month. May 30, 1813, she sailed from Liverpool for the United States, with the licensed cargo. Alexander M'Gregor and family were passengers in her. Ogden claimed the ship for himself and M'Gregor, and the goods for many persons in parts. The cargo was chiefly enemy's goods. Held, this was trading with the enemy, and the ship forfeited, as prize of war. She went to England after the war was known, and sailed from a British port nearly a year after the war was declared. She was loaded in an enemy's country, by persons trading there. She had a British license &c. ; and there is reason to presume, said the court, the cargo is enemy's property ; and the court will not make an order for further proof in favour of the claimants, where it appears, as in this case, there has been an intentional and fraudulent suppression of papers. *Secus*, if by accident or mistake. She "was certainly guilty of trading with the enemy." Citizens having a right to withdraw their funds from an enemy's country, on the breaking out of a war, must do it in a reasonable time ; eleven months is too late, and amounts to an illegal traffic with the enemy.

CH. 224.  
Art. 9.

§ 8. In this case the court said, "it is not to be contended that the sailing with a cargo, on freight, from St. Petersburg to London, after a full knowledge of the war, did not amount to such a trading with the enemy, as to have subjected both vessel and cargo to condemnation, as prize of war, had she been captured when proceeding on that voyage ;"—no excuse the voyage was to obtain funds to pay her expenses ; nor that an American minister thought the voyage legal. Being thus liable to capture, she remained so when innocently sailing in ballast from London to the United States, both being parts of the same circuitous voyage,—in fact, a voyage from St. Petersburg to the United States by the way of London ;—and "was seized in *delicto*," on a just view of the continuity of the voyage. And a capture, as prize of war, may legally be made within the territorial limits of the United States, at any place below low-water mark.

9 Cranch,  
120.—8  
Cranch, 451,  
The Joseph.

Appeal from the Circuit Court in Massachusetts :—and held, that after war is declared, an American citizen cannot legally send a vessel to an enemy's country to bring away his property.

8 Cranch,  
185, The  
Rapid.

§ 9. *Enemy's license, and trading with him.*—Appeal from the Circuit Court of Massachusetts. The Hiram was laden with flour bound from Baltimore to Lisbon, in 1813,—condemned for sailing under a license from the enemy. This

1 Wheaton's  
R. 440, Hi-  
ram's case.

CH. 224. license is closely connected, in principle, with the offence of trading with him ; in both cases the knowledge of the agent will affect the principal, though he may in reality be ignorant of the fact. It will be observed, in this case, that the *Hiram* was forfeited, and liable to be seized merely for sailing under the enemy's license,—no allegation she was in the furtherance of his views or interests, (as in the former cases,) or supplying him, or in any manner aiding or benefiting him.

9 Cranch,  
126, the  
*Mary*.

§ 10. *Vessel protected from seizure, though having a British license*.—Appeal from the Circuit Court in Rhode Island, condemning the *Mary's* cargo. Cause was argued last term, and this court gave leave for further proof, by affidavits, on certain points stated. The *Mary*, an American vessel, sailed from England in August, 1812, in consequence of the repeal of the British orders in council, and was forced by the dangers of the seas, to put into Ireland, where she was necessarily detained till April, 1813, when she sailed again for the United States, under the protection of a British license,—was captured on her voyage by an American privateer ; held, she was protected by the President's instructions of August 28, 1812, as the continuity of the voyage was not broken : her first British license was dated July 8, 1812, before knowledge of the war in England ; began to load August 3, and sailed August 15, 1812, with funds placed in England as early as 1811. The instructions directed "the public and private armed vessels of the United States, not to intercept any vessels belonging to citizens of the United States, coming from British ports to the United States, laden with British merchandise, in consequence of the alleged repeal of the British orders in council," if they sailed before September 15, 1812. 2. Another material matter was decided in this case ;—that is, if the vessel be condemned in the District Court as British property, merely because it was not for the interest of her owner to appear and claim her, this did not preclude the owner of her cargo from proving her American property ; and the district judge should have inquired into the right of property, though her owner was in contumacy, as far as material to a right decree as to her cargo. Hence the Appellate Court may make such inquiry. The admiralty notice as to the *Mary* herself, on the libel, was notice only to those who could assert some title to her, or interest in her, and not to those who had no interest in the vessel herself, so not parties in the cause as to her, and so not concluded.—Cargo restored as American property ; but reasonable costs and expenses allowed to the captors. It will be observed, the court took no notice of the British licenses, though one of them was obtained of the enemy during the war.

§ 11. *How the produce of the soil adheres to it in war &c.* Appeal from the Circuit Court in Maryland. Case. The Danish island Santa Cruz, was captured by the British in the late war, and this sugar was shipped by Bentzon, a Danish officer there, after the seizure of the island by the English, and while they held it. The Danish subjects there retained their lands and estates. Bentzon owned the land there, whereon this sugar was produced ;—but on the surrender of the island he withdrew from it, and resided in Denmark, but managed his estate in the island by his agent, who shipped the sugar in a British ship, to a house in London, on account and risk of Bentgon. On her passage she was captured by an American privateer ; held, 1. That this island, while so held by the English, was, to every commercial and belligerent intent, a British colony : 2. This sugar was British property, because its owner, though *domiciled* in Denmark, owned the British soil on which produced ; and on the rule laid down by Sir W. Scott, to wit : “ the possession of the soil does impress on the owner the character of the country, as far as the produce of that plantation is concerned, in its transportation to any other country, whatever the local residence of the owner may be ;” meaning no doubt the owner of the plantation remains the owner of the produce, though not so expressed. And it seems held, that as far as Bentzon held this plantation under the British government, he incorporated himself with the British interest, and is to be taken as a part of the British nation. Said Marshall C. J. in giving the opinion of the court, “ Personal property may follow the person any where ; and its character, if found on the ocean, may depend on the domicile of the owner.” This is an ancient and sound position. He adds, “ But land is fixed. Wherever the owner may reside, that land is *hostile* or *friendly*, according to the condition of the country in which it is placed.” This too is an ancient and sound position. Therefore lately, when at war with Great Britain, we never treated as hostile, lands in the United States owned by British subjects ; and here it is believed the sound principle stops. In the late war of 1812, British subjects owned numerous tracts of land in the United States,—were they allowed as *friends* to carry the produce of them to any other country ? A London merchant, for instance, owned a plantation in Virginia, and his agent on it shipped the produce to this merchant in London, on his account and risk, and it was his property. Was it exempted on the ocean from American capture ? In this situation in the wars of 1775 and 1812, property must have been captured by us in scores of cases, and the same on the British side, as American citizens held lands in the British territories. It is believed there never was

CH. 224.  
Art. 9.

9 Cranch,  
191, Thirty  
hhd. of sugar  
v. Boyle & al.  
case of Bent-  
son.

Commen-  
tary.

See a note  
at the end of  
this case.

CH. 224. a claim or defence of this kind to be found in any book prior to the year 1783, and then only one or two solitary cases.  
 Art. 9.

Above a century past the principle has been well settled, if we owe a debt to an alien friend, and he becomes an alien enemy, he, during the war, loses his interest, but not his principal. Thus public law distinguishes between principal and interest, in their nature so united. Far longer has public and municipal law made a clear distinction between the soil and the person of the owner, and between the soil, and the produce of the soil, after separated from it, and shipped on the ocean, consigned to another country. Again, it has ever been an invariable principle of the common and civil law, and it is believed of all law, that personal property, moveable as this sugar was on the ocean, when seized, and so totally severed from the soil on which raised, adheres to the person of the owner, and not to such soil. We know of no personal moveable property adherent or attached to the soil, but that actually used on or with it,—as slaves on a plantation. But the slave loses his plantation character, and ceases to adhere to it, or to go with it, as soon as he is carried permanently from it to be sold elsewhere, as this sugar was when captured. The same principle ever holds as to horses and cattle raised or used on a farm,—they are completely severed from it, the moment they are carried from it, and shipped on the ocean for a foreign market, never to return.

The true question is, when does the produce of the soil, or the moveable property used on it, cease to adhere or to be attached to it? Clearly when permanently removed from it, and is fully intended no longer to have any connexion with it. This was clearly the case of this sugar when captured on the ocean. This is the only definite and practical rule. Suppose this sugar had been carried to Bentzon in Denmark, and he had kept it there a year, and then shipped it, as his property, for Lisbon, and on its passage to that place it had been captured by an enemy of Great Britain, while she retained Santa Cruz, and while he continued to own the soil there, on which raised, why not prize to the captors, according to this doctrine, not of many years standing?

The Chief Justice further said, "While that island belonged to Denmark, the produce of the soil, while unsold, was, according to this rule, Danish property, whatever might be the general character of the particular proprietor. When the island became British, the soil and its produce, while that produce remained unsold, were British." Now according to this doctrine so long as Great Britain retained, or should retain, this island, and Bentzon his plantation in it, and this sugar unsold, though half a century, it remained British property, liable to

be captured or seized, as prize of war, by the enemies of Great Britain wherever met with on the ocean ; and Bentzon would be a British subject *quoad* this plantation, and its produce not sold, to all commercial and belligerent purposes, "although incorporated, so far as respects his general character, with the permanent interests of Denmark." The Chief Justice said further, Bentzon "was incorporated, so far as respected his plantation in Santa Cruz, with the permanent interests of Santa Cruz, which was, at that time, British ; and though, as a Dane, he was at war with Great Britain, and an enemy, yet, as a proprietor of land in Santa Cruz, he was no enemy, he could ship his produce to Great Britain in perfect safety." Exactly the case in our wars with England of 1775 and 1812, of every British subject holding lands in the United States. He was our public enemy in every thing but his lands here, and their produce ; as to them our friend ; and we could not capture or seize it, though he, in open war between his domiciled country and ours, had totally separated and permanently this produce from his lands here, and had got it into the British channel, never more to have any relation to his lands here. If it be said this is the result of a nation's allowing public or general enemies to hold lands in its territories, this may be denied. On the whole it seems to be admitted that this is the first decision of the kind in our country. See *Phoenix's case*, Ch. 227, s. 58.

CH. 224.

Art. 9.

In admitting this new principle in the United States, there is another matter of high consideration to be attended to. It is this : Our Congress, our national Legislature, that declares war and designates public enemies, does not admit aliens to hold real estates here in the United States, (except it passes naturalization acts)—but each State Legislature in the Union can allow aliens, even enemies, to acquire and hold such estates in each State, and so the President and Senate by treaty. Congress does not allow an alien enemy to be naturalized in war ; yet a State may, partially, by allowing him to acquire and hold lands here ; then, though a general enemy to the United States, yet he, as the proprietor of such lands he owns here, on the new principle, is not an enemy, but a friend ; and, as such friend, has a right, though domiciled in the enemy's country, in safety, to carry their produce about the world in a usual way for a market. Is there not some mistake in the report of this case ?

An eminent lawyer thinks I have mistaken the opinion of the court in this case, and observed, that "Bentzon was a neutral, and as such by his neutral domicile could be entitled to a restitution ; but a new principle intervened, which shut him out from restitution, although he had a neutral domicile ; that



CH. 224  
Art. 9.

principle was, that the property claimed was enemy's property, because it was the produce of a hostile soil, notwithstanding the owner's usual character was neutral. But if Bentzon had been a British subject, then his personal character would (if he had been domiciled in England) have been hostile, and his property would have been condemnable, as the property of an enemy, independently of the other ground, so that the new principle does not shield the property of a person having a hostile domicile, from condemnation, merely because the property comes from a neutral soil or plantation; but it condemns it if the personal character of the owner, by reason his domicile, be hostile, and it condemns it also if his personal character be neutral. It never acquits the property where the domicile would condemn it; but it condemns it even where the domicile is neutral, and would acquit it. In this respect the rule operates one way only, and wants reciprocity. Therefore the case put of a London merchant, owning a plantation in the United States, is not admitted to be correct; for the property would still be condemned because of his domicile in an enemy's country. I admit the Chief Justice's reasoning would seem to reach such a case, but I know it never, in fact, was designed to touch it."

This distinction is the English distinction, which holds that a hostile soil owned by a neutral, impresses on him, as to that soil, a hostile character, and makes his produce of it condemnable; but a neutral or friendly soil owned by an enemy does not impress on him a neutral or friendly character, as to that soil, and so does not exempt his produce of it from condemnation. But it will be observed the Chief Justice did not make this distinction, if the case be correctly reported; but he expressly puts the case of the friendly or neutral soil, as cited above, as impressing its character on the owner of it, and adds the case put of the London merchant in principle, in saying that Bentzon "was incorporated as far as respected his plantation in Santa Cruz with the permanent interest of Santa Cruz, which was at that time British; and though as a Dane he was at war with Great Britain, and an enemy, yet as a proprietor of land in Santa Cruz he was no enemy: he could ship his property to Great Britain in perfect safety." This new and unreciprocal principle evidently originated with the strongest on the ocean wishing to multiply the causes of captures and condemnations. This principle merits much attention, especially when extended to produce, after permanently separated from the soil. Held in this case, a vessel liable to capture as enemy's property as having his license, may be seized after she returns to one of our ports, and be condemned as prize of war; the same if a vessel be so liable for trading with him,

4 Wheaton's  
R. 100, The  
case of the  
Caledonia.

2. A seizure made by any person is good, if recognized by the government by legal process : cases otherwise cited p. 101. **CH. 224. Art. 9.**  
 In a like case of seizure in port for such cause, the circumstance of the vessel's having been in an enemy's port for adjudication, and allowed to pursue her voyage, is such a ground of presumption of a license, as to be cause of condemnation if not explained by evidence. **4 Wheaton's R. 103, Cheves v. Lamb.**

The property of a house of trade established in an enemy's country is seizable as prize, wherever may be the domicil of the partners. **4 Wheaton's R. 105. Friendschaft.**

§ 12. Case of a British license in a vessel bound with flour from Alexandria to Cadiz : and held as in former cases, that sailing under the enemy's license constitutes, of itself, an illegal act, and is cause of confiscation, without regard to the object of the voyage, or to the port of destination ; that it is an attempt by one individual of a belligerent country to clothe himself with a neutral character, by the license of the other belligerent, and thus to separate himself from the common character of his own country. See s. 11. **2 Wheaton's R. 143, The Ariadne.**

§ 13. Error to the Circuit Court of the District of Columbia. Assumpsit for the price of a British license, sold to the deft. Plea, *non assumpsit*. Court held, that the use of a license or pass from the enemy, by a citizen, being unlawful, one citizen had no right to purchase of, or sell to, another, such a license or pass to be used on board of an American vessel. The several cases on this subject briefly brought together in a note 7 to 12. **3 Wheaton's R. 204, 212, Patton v. Nicholson ; rather contra 13 Mass. R. 26, 50, Coolidge v. Inglee.**

§ 14. Looking at the cases of the *Ariadne* and *Hiram*, and observing that merely sailing under an enemy's license is cause of confiscation of vessel and cargo, we look back to the *Mary*'s case, sailing under such license, from Ireland to the United States in the late war ; and we are led to inquire what there was in the President's proclamation that, in the least degree, covered or pardoned her sin in sailing under this license, this enemy's protection ; for, if forced into Ireland to repair, by necessity, she could not, legally, act beyond that necessity ; and, surely, this did not authorize her to traffic with an enemy for this license, obtained in Ireland in open war. If it be said she was in a lawful voyage as to the United States, under the proclamation, and needed a license to secure her from captures by the enemy ; it may be replied, that every American vessel in the war, in a legal voyage in respect to the United States, had need of such security to save her from enemy's seizure. How widely different the principle in the *Ariadne*'s case, and that in *Bentzon*'s sugar case : in this, a principle adopted, without precedent, affording, in its nature, very extensive intercourse and traffic among enemies ; in the **Comment &c.**

CH. 224.

Art. 9.

Ariadne's and Hiram's cases, a principle, so rigidly strict, as to make it confiscation of vessel and cargo, even to sail under an enemy's license, without regard to the object of the voyage or to the port of destination, that is, without any inquiry whether she meant to injure her own country or favour the enemy, or was sailing to his benefit or not. There was a material fact in these license cases, not noticed. Our government allowed the British consul to remain in Boston in his official business in the war, therefore a sort of neutral, at least; and it appears the licenses usually, and in all the leading cases, were obtained from or through him. Was traffic with this consul, in fact, trading with the enemy of a dangerous kind? The real question is, ought not, in each case, the use and intention, the object and purpose, of having such license, to be inquired into? There was no doubt in the Julia's case, the first decided, the intention and use were clearly criminal. She was indirectly supplying the enemy. So was the Aurora's case. Till the Ariadne's case, the inquiry was made, or the object and intent appeared to be criminal; or, as in the Hiram's case, the inquiry was not asked for; and in the Ariadne's case, do the facts, on which the court must have decided, justify the rule laid down by the judge who declared its opinion?

In all these cases, it must be observed that, where a vessel is liable to capture as prize, she must also be liable to forfeiture and seizure, for breach of the citizen's allegiance or obligations to his own country. The Mary, when captured, was sailing under an enemy's license, purchased in his country, when the war was fully known, and for the express purpose of protecting her and her cargo from his captures, and for no bad purpose, unless this was a bad one. So her license was right on the principles of national law which could not be varied or affected by the President's proclamation.

1 Wheaton's  
R. 62, The  
schooner  
Rugen.

§ 15. Appeal from the Circuit Court in Georgia. This schooner and cargo were libelled as prize, as enemy's property, or as citizen's for trading with the enemy; claimed by a neutral Swede, resident in the United States, and domiciled here, so owing a temporary allegiance. Proved she was in fact owned by American citizens; had simulated papers;—and condemned for trading with the enemy between Savannah and Jamaica,—cleared, however, for Carthage. Material points decided were, that American citizens "are equally guilty of trading with the enemy, whether that trade were carried on between a British port and the United States, or between such port and any foreign nation." 2. The offence of so trading 'was complete the moment the Rugen sailed from Savannah

with an intention to carry her cargo to Kingston in Jamaica," *CH. 224.*  
so liable to forfeiture and seizure. *Art. 9.*

§ 16. The *George* had been trading with the enemy at St. Johns, in English goods, and cleared for the Havana, and near Grand Magnan was, collusively, captured by the American privateer *Fly*, and brought in and libelled as prize. The United States interposed a claim for the *George*, and adjudged to them, and not to the privateer, on the ground she was a party in the collusive capture by agreement. The case turned on facts only, and nothing material in it except the court, on strong and connected circumstances, decided the *George* was bound to some port in the United States, and that the *Fly* captured by agreement, against much positive swearing unimpeached by other witnesses.

2 Wheaton's  
R. 278, 287,  
The *George*.

§ 17. The *Anna Maria*, an American vessel, bound from Alexandria to St. Bartholomews, was captured by an American privateer near that island, on the pretence she was trading with the enemy, and so bound to St. Thomas's, in British possession. The evidence proved she was in a legal voyage, and that the seizure of her was illegal. The owners of the *Anna Maria* filed a libel in the District Court in Maryland, for damages for the illegal capture, and loss of her afterwards by the misconduct of the captors. Held, 1. The right of search is a belligerent right not to be questioned: 2. But must be conducted with as much regard to the safety of the vessel seized, as may be consistent with thorough examination, and no more: 3. Though, however, her situation was suspicious, but the first two hours' search amply proved a fair voyage, and again searching next day was going too far,—so keeping her master and crew in irons a long time;—so leaving her in a perilous situation a long time, neither completing the capture, nor restoring her &c.: 4. These proceedings, after a search, "converted the whole transaction into a wanton marine trespass," without excuse: 5. Cause remanded to Circuit Court, with direction to reverse the sentence of the District Court, and to direct commissioners to ascertain the amount of the libellant's damages; these to consist of the value of the vessel, and the prime cost of the cargo, with all charges, and premium of insurance as far as paid.

2 Wheaton's  
R. 327, 336,  
The *Anna*  
*Maria*.

§ 18. The *Eleanor* was an American vessel on a voyage from Baltimore to Bourdeaux, and October 16, 1813, in the night, fell in with the President and Congress frigates. Commodore Rodgers commanded the first, and the squadron, and Captain Smith the last. The Congress seized the *Eleanor*, and overhauled her by a lieutenant, disguised as an enemy,—the President not then in sight. She was lost. Her owners

2 Wheaton's  
R. 345, The  
*Eleanor*.

CH. 224. libelled for damages Rodgers and Smith, on the ground her loss was by their fault ;—whether by theirs or of her crew was the question. Smith's death was, pending the suit, noted.

Art. 9.

The evidence proved the Eleanor was lost by the misconduct of her crew ;—libel dismissed. Many points are stated as having been decided in this case very important to those concerned in vessels in cases of capture or detention : 1. The commander of a squadron is liable for the trespasses of those under his command, to individuals, " in case of positive or permissive orders, or in case of actual presence and co-operation : " 2. When a capture is actually made, by his assent, expressed or implied, the prize master is viewed as bailee of the squadron ; that is, to all in it entitled to shares in prize money ; not so as to mere trespasses, and no conversion to the squadron's use : 3. His case differs from that of the commander of a single ship,—he is more strictly liable for those under his command : 4. Owners of privateers are liable for the acts of those employed in them, because they do employ them : 5. The stratagem practised consisted with the rights of war : 6. A belligerent may detain for examination every vessel he meets with on the ocean, but a national one, and he is not liable for any loss that may happen in a reasonable exercise of this right ;—is *damnum absque injuria* ; " the principal right necessarily carries with it also all the means essential to its exercise : 7. The crew of a vessel are actually bound to do their duty, till in fact made prisoners, and to obey the officer remaining in command : 8. It is not an unreasonable exercise of this right, to take the master and second mate of the captured vessel on board the capturing vessel for examination : 9. Whenever an officer seizes a vessel as prize, he is bound to put a competent officer and crew on board her to take care of her, exclusive of her original crew, unless they agree to assist : 10. The officers and crew of the Eleanor, during her search, were bound to obey the commander of the frigate, as the search-officer commands during the search.

3 Wheaton's R. 14, 52, the *Friendschaft*, Winn & al. claimants, Ch. 227, s. 58, several cases ; and s. 59, 60, 61, 62, 63.—Wheaton on Captures, as to domicil, 101 to 151.—2 Wheat. App. 27.—5 Vesey jun. 750, 786, 789.

§ 19. *Seizure,—points, domicil, &c.*—Appeal from the Circuit Court in North Carolina. The brig *Friendschaft* was seized on a voyage from London to Lisbon, by an American privateer, in 1814 ;—libelled, and sundry claimants of her cargo, Winn & al. Winn's affidavit stated he had been at his fixed place of residence in Lisbon, when the capture was made, where previously he had resided several years, and where he remained till June 12, 1814, when he left Lisbon for Bourdeaux, and afterwards arrived in London on mercantile business, (was a native-born Briton,) " was still a domiciled subject of Portugal, intending to return to Lisbon, where his commercial establishment is maintained, and his business

carried on by his clerks, until his return." These facts were verified by the deposition of his clerk in Lisbon. Held, he was a neutral Portuguese, and that he did not lose his *domicil* in Lisbon, (a point urged,) by a visit to his native country, as above, *animo revertendi*, and so leaving his said establishment; of course his property could not be seized by the enemies of his native country: 2. British subjects, resident in Portugal, lose their native character, and acquire that of Portugal, where they carry on trade, though there entitled to great privileges: 3. A bill of lading, consigning goods to a neutral, but not accompanied by an invoice or letter of advice, is not sufficient evidence to prove the goods his; but sufficient for the introduction of further proof: 4. Informal proceedings in the District Court amended in the Circuit Court: 5. Further proof admitted by the Supreme Court: 6. Part of it the affidavits of parties.

CH. 224.  
Art. 9.

§ 20. *Seizure,—main point neutral territory.*—Appeal from the Circuit Court in Maryland. The British vessel, *Anne* and cargo, was seized by an American privateer, at anchor, near the Spanish port of St. Domingo, March 15, 1815, after the peace, and within Spanish marine jurisdiction. Spanish Consul claimed on account of a violation of the neutral territory of Spain. But parties admitted witnesses *sub modo*. After the peace the British owner claimed. Held, the capture was within Spanish neutral territory: but 2. The Spanish Consul could not claim on this ground, merely as consul. 3. The seizure was legal as between the belligerents: 4. Spain only had a right to complain of this territorial violation: 5. As the captured ship commenced hostilities, she forfeited her neutral protection; she had no right to use force, but in self-defence: 6. Had the captors been guilty of gross misconduct or fraud, they had forfeited their right to the captured vessel, and she had belonged to the United States: 7. The captors are witnesses to the circumstances of the capture, joint, collusive, or within neutral limits; also when further proof is ordered, and benefit allowed to both parties; 8. The common law rule, as to competency, does not apply to prize proceedings: 9. In them all persons are competent, merely on the ground of interest, subject to all exceptions as to credibility.

3 Wheat. R.  
435, The  
*Anne*.

See Ch. 227,  
s. 69.

§ 21. An American ship captured and condemned by the enemy, re-captured;—claimed by her former American owner &c.—Appeal from the Circuit Court in New York. The *Star* so captured, and regularly condemned in a British Prize Court, and sold to British subjects, was captured by the American privateer *Surprise*, January 27, 1815, passing from India to London, libelled in New York, and claimed.

3 Wheat. R.  
78, The *Star*.

CH. 224. Main question was on the construction of our salvage act of Art. 9. March 3, 1800, and our prize act of June 26, 1812. On the former, the American claimant was not entitled,—but was, paying salvage, on the latter. Opposed, because the *Star* had been condemned, as recognised in said act of 1800. Held, first, by the ancient marine law, condemnation extinguished the former owner's title,—so is the law of nations, and act of 1800, and this not repealed by the act of 1812 : 2. British salvage acts of 13 Geo. II. and 43 Geo. III., reserve the *jus postliminii* as to British subjects only, and extend not to neutral property : 3. The act of 1812, sect. 5, did not repeal the provisions of said salvage act of 1800, but merely affirmed the pre-existing law : 4. The salvage act of 1800, adopts the rule of reciprocity on re-capture. This principle was adopted in the *Adeline's* case, 9 Cranch, 224 ; French property was captured by the enemies of France, and re-captured by American friends,—no restitution, as France would deny it. The claim not allowed. Sundry cases in notes, p. 93 to 101.

3 Wheat. R. 409, the *Atalanta*.—9 Cranch, 383.

§ 22. Neutral goods in enemies' armed vessels not liable to be seized or captured—Appealed from the Circuit Court in Georgia. British armed vessel with French goods on board, taken in 1814, on her voyage from Bourdeaux to Pensacola, by an American sloop of war, and sent into Savannah. Goods claimed by Fousset, domiciled at Bourdeaux, and on further proof restored finally, upon the ground that this French neutral had a right to employ an armed belligerent carrier to carry his goods, as well as an unarmed one. *Quære* if not afterwards condemned.

§ 23. Seizure on the act of February 18, 1793, as to enrolling &c. ships &c. Ch. 187, a. 7. s. 17. ;—for forfeiture in the slave-trade, Ch. 186, a. 9, s. 6, *United States v. Schooner Sally*.

7 Cranch, 286, *United States v. Tyler*.

§ 24. The deft. was indicted for having put goods into a carriage, with an intention to carry them out of the United States, contrary to said act of Congress of January 9, 1809, an offence punishable by a fine, four times the value of the goods ; held, that it was not necessary for the jury to find the value of the goods ;—cause remanded to the Circuit Court in Vermont to render judgment on the verdict.

7 Cranch, 506.—See Ch. 40, a. 11, s. 24.

§ 25. *Mercantile domicil* is not affected by the kind of trade. As where a Spanish subject came to the United States in a time of peace between Spain and Great Britain, (1803) in order to carry on trade between the United States and the Spanish Colonies, under his king's license, and he continued to reside here and carry on that trade after a war took place between Spain and Great Britain ; held, he continued to be an

American merchant, though the trade could be carried on by a Spanish subject only, and though he did not reside to trade generally, but to carry on that special trade only. CH. 224.  
Art. 10.

§ 26. What is not trading with an enemy within the act of Congress of June 13, 1798, non-intercourse act as to France, forbidding all American vessels to sail to French ports, also to trade with the French. In 1799, a vessel belonging to citizens of the United States bound to the Havana, "was compelled, being in distress, to put into Cape François," in the possession of France, and there arrived January 5, 1799; her cargo was landed to repair her, French officer there seized a part, and permitted her master &c. to sell the rest. Not allowed to bring away the part not seized, and he had no alternative, but to leave it there, or to sell it, and vest the proceeds in the produce of the island, or take bills; and the special verdict found also he was compelled so to sell and take such produce in payment. Held lawful, and no trading with the French;—underwriters liable, vessel being captured. Master's conduct not voluntary, but the effect of compulsion. 3 Cranch,  
210, Hallet &  
al. v. Jenks &  
al.; error to  
the Court of  
Errors &c. of  
New York.

ART. 10. *Seizures of armed vessels fitted out against law.* 3 Wheat. R.  
246, 336,  
Gelston & al.  
v. Hoyt.

§ 1. Error to the Court for the Trial of Impeachments and Correction of Errors of the State of New York. This important case, the report of which fills ninety pages, was concisely thus: June 5, 1794, Congress passed the act, cited a. 6, s. 2, ante, 3d sect. of the act, as cited there against this offence. And about July 1, 1810, Goold Hoyt at New York, fitted out a ship called the American Eagle, with five hundred tons of stone ballast, one hundred hogsheads of water, one hundred and thirty barrels of salted provisions, twenty hogsheads of ship-bread; and it was suspected he was fitting the same for the service of Petion, who governed a part of the island of St. Domingo, to be used by him hostilely against Christophe who governed the other part, both viewed by David Gelston and Peter A. Schenck, original defts., as foreign princes, within the meaning of the said act. Information of this being given to the President of the United States, he, July 6, 1810, instructed Gelston and Schenck, (collector and surveyor of that port) to seize, take, carry away, and detain, as forfeited, to the United States' use, said ship and equipments; and July 10, they seized, took, carried away, and detained them accordingly; and immediately the same were libelled and informed against in the District Court in New York, as so being forfeited; and the usual notice given on this libel, *United States v. Ship Eagle*, alleging she had been fitted out and armed, and attempting to be fitted out and armed, and equipped and furnished, "with intent to be employed in the service of Petion against Christophe, and in the service of that part of the island



CH. 224. of St. Domingo which was under the government of Petion,  
 Art. 10. against that part of the said island of St. Domingo which was  
 under the government of Christophe, contrary to the statute in  
 such case made and provided." On which Hoyt filed his  
 claim for the same ship &c., denying said allegations &c.  
 April 1811, on his application said court caused the same to  
 be appraised and delivered to him on security &c.,—was ap-  
 praised at \$35,000, and security given and accepted, trial  
 had, and libel dismissed, and decree of restoration to Hoyt,  
 and certificate "of reasonable cause for the seizure of the  
 said vessel" was denied.

Nisi Prius  
 Court.

Hoyt then brought his action of trespass against Gelston and Schenck for said ship, appurtenances, and equipments, (specifying them,) and inserted five counts: 1st and 2d. Common form: 3. Laid a conversion: 4. Stated also the use Hoyt meant to make of her, and a conversion: 5. Stated also, the defts. held possession a long time &c. expenses put to &c. in attempting to obtain restoration &c., *ad damnum* \$200,000. First plea, not guilty, and issue joined. Second plea, stating the special matter and seizure under the president's said direction in bar; but instead of the offence in the libel stated the said Hoyt intended the ship &c. "should be employed in the service of a foreign state, to wit, of that part of the island of St. Domingo which was then under the government of Petion, to commit hostilities upon the subjects of another foreign state with which the United States were then at peace, to wit, of that part of the island of St. Domingo which was then under the government of Christophe, contrary to the form of the statute in such case made and provided." Third plea, the same in substance, but varied the offence, and alleged said ship &c. "was attempted to be fitted out and armed;" that said ballast, water, provisions, and bread were procured for her equipment, and then on board of her as part of her said equipment, with intent the same ship &c. "should be employed in the service of some foreign state, to commit hostilities upon the subjects of another foreign state with which the United States were then at peace, contrary" &c. The defts. according to a statute of New York, subjoined a note stating their defence under the general issue and the facts they meant to give in evidence. In substance, the facts in the second and third pleas were,—attempted to be fitted out and armed, and was fitted out and armed, with intent said &c. "should be employed in the service of a foreign prince or state, to wit, of that part of the island of St. Domingo which was then under the government of Petion, to cruise and commit hostilities upon the subjects, citizens, and property of another foreign prince or state with which the United States were then at peace, to wit, of that part of the island of St. Domingo which was then

under the government of Christophe, contrary to the form of the statute in that case made and provided ;"—also, with intent &c., as last above, but omitting the names of the island and of Petion and Christophe, alleging only some foreign prince or state, and instead of the president's directions they stated they should offer to prove Gelston was collector of the port &c., and Schenck surveyor, July 10, 1810, and before and since, and as such did seize, take, &c. said ship &c. according to the form of the statute in such case made and provided, "and by virtue of the power and authority vested in them by the constitution and law of the United States" (dated March 11, 1813.) Hoyt demurred generally to the second and third pleas, and joinder, and on them judgment for Hoyt.

CH. 224.

Art. 10.

Gelston and Schenck filed a bill of exceptions, which discloses further facts, to wit, that November T. 1815, at a *nisi prius* court a jury was impannelled to try said issue, and Hoyt gave evidence of ownership, possession, &c. and said libel, proceedings, and decree of acquittal and restoration, and said denial of a certificate ; also, evidence said ship &c. were of the value of \$100,000, and of said seizure ; that Gelston and Schenck insisted the plt. had not offered sufficient matter to support his action, and prayed said justice to pronounce such matters insufficient to entitle said Hoyt to a verdict and to nonsuit him : and said justice instructed the jury that they were sufficient to entitle him to a verdict ; and Gelston &c. excepted, denying said decree of acquittal, though not appealed from was conclusive : that Gelston &c. offered to prove in mitigation of damages said ship was attempted to be fitted out &c., and was fitted out &c. as above, with intent &c. as above, as to St. Domingo ;—also, that they were collector &c., and as such seized &c. (according to the facts in said notice,) that they insisted these matters ought to be in evidence in justification &c. or in mitigation of damages,—Hoyt objected,—as he admitted the said Gelston &c. had not been influenced by any malicious motives in the seizure &c. ; that said justice refused to admit all such matter in justification or mitigation &c., as Hoyt's admission precluded him from any smart money or more than the actual damages, so left the cause to the jury, and the jury found damages \$107,369 43 ; said Geldston &c. excepted &c. And said judge put his seal to said bill of exceptions, November 15, 1815. This was carried to the Supreme Court of New York, and the exceptions disallowed by that court ; cause was then carried to said Court of Error of the State, which affirmed the judgment of said Supreme Court, January 1816, in Hoyt's favour, and remitted the cause to it to execute the judgment. After this came the writ of error of the Supreme Court of the United

CH. 224. States to said State court of errors, which returned the said remanding in answer, and stated the whole record was in the Supreme Court of the State. Gelston and Schenck then applied to that court to stay proceedings till application could be made to the Supreme Court of the United States, as to said writ of error. To avoid this delay, Hoyt agreed that the annexed papers were a true copy of the record and bill of exceptions so remitted, and that said copy should be considered by the Supreme Court of the United States as a true copy of &c., and should have the same effect as if annexed to said writ of error, to be transmitted by the clerk of said State court to the clerk of the Supreme Court of the United States by him to be annexed to said writ of error &c. ; said State court consented.

This case it will be observed, like *Cabot v. Bingham*, embraced many matters very important in beginning to practice, as it were, on the principles of our young judicial system.

The points decided in this case by the Supreme Court of the United States were : 1. That by the judiciary act of Sept. 24, 1789, sect. 25, this writ of error might be directed to any State court in which the record and judgment in the case might be found : 2. That at common law any one at his peril may seize for the forfeiture to the government ; that the revenue officers may seize as art. 2, s. 1, above, and as by act of Congress of Feb. 18, 1793, sect. 27 : 3. The forfeiture attaches *in rem* the instant the offence is committed : 4. That said decree of acquittal was conclusive where not appealed from : 5. That the Federal courts have exclusive jurisdiction in cases of forfeitures under the laws of the United States, as well in cases of acquittal as of condemnation : 6. But their final decision must be made *in rem*, as was done in this case, before an action at common law can be brought in the State court for the seizure : 7. This action at common law for damages for the tort in seizing can be brought only in the State courts ; but they cannot try the question of forfeiture : 8. If this action at common law be brought after a condemnation, or after acquittal, with a certificate of reasonable cause of seizure given by the Federal court, the decree or certificate may be pleaded in bar : 9. This State action is abatable if brought pending the Federal suit *in rem* : 10. If the Federal court acquit and refuse such certificate, the seizure is conclusively established to be tortious, and the question of forfeiture absolutely settled : 11. As our Federal courts have peculiar and exclusive jurisdiction, their decisions are conclusive and binding on every other court where the same subject matter comes directly or incidentally in question : 12. If the matter be finally decided by the Federal courts, so within their jurisdic-

tion, it is immaterial whether they condemn or acquit; this matter is to all intents *res adjudicata*: 13. The plea need answer only the gist of the action: 14. *Gelston &c.* should have also pleaded that the ship and equipments were forfeited to the United States for the cause aforesaid &c.; this material matter must be expressly and directly averred: 15. Sect. 7 of said act of 1794, did not authorize the president to order private persons to seize, but only to call out a military force to enforce the seizure: 16. This section only applies to cases in which a seizure cannot be made, or a detention preserved, by the ordinary civil authority, and so deemed by him: 17. As to new States formed in revolutions it is the exclusive right of the government, not judiciary, to acknowledge and recognise them; till this is done by our government, or by that under which the new State previously was, our judicial courts must observe the ancient order of things and conform thereto: 18. Said Petion and Christophe not foreign princes or states within the meaning of the said act of 1794: 19. But the plea justifying under this act need not state the particular prince or state by name, against whom or which the ship of war intended to cruise: 20. The act of Congress of February 18, 1793, sect. 27, authorizes officers of the revenue to seize any ship or goods for any breach of the laws of the United States.

CH. 224.  
Art. 11.

§ 2. This power to issue a writ of error to the highest court in a State, respects only a final judgment of such court, and awarding a *venire facias de novo* is not a final judgment.

3 Wheat. R.  
433, *Houston v. Moore*.

ART. 11. *Several cases.*

§ 1. *Municipal* forfeiture yields to the right of capture. Hence, where this right exists there can be no seizure for such forfeiture. Appeal from the Circuit Court in Massachusetts. The brig *Sally* was engaged in illicit trade with the enemy at St. Andrews, in New-Brunswick, in July 1812, and was captured by an American privateer. She also had violated the non-intercourse act, was libelled by the captors as prize of war, and the United States claimed her also, as for a forfeiture under the said non-intercourse act, under which act she was in fact forfeited; but adjudged to the captors, on the ground above stated; and held, such forfeiture is absorbed in the more general operation of the law of war. The prize act of June 26, 1812, operates as a grant from the United States to the captors of all property, rightfully captured by commissioned privateers as prize of war.

8 Cranch,  
392, *The Sally*.

§ 2. *How a forfeiture affects an innocent purchaser.* Appeal from the Circuit Court, in Maryland, restoring coffee seized and libelled for violating said non intercourse act of March 1, 1809. Held, the forfeiture for this violation took place the moment the offence was committed, and avoided a

8 Cranch,  
398, *United States v. 1960 bags of coffee*.

CH. 224.  
Art. 11.



8 Cranch,  
417, United  
States v. Brig  
Mars.

subsequent sale to an innocent purchaser, though there may have been a regular permit for landing the goods, and though the duties may have been paid. Different if the government have an election. 13 Mass. R. 182.

§ 3. Like principle settled on appeal from the Circuit Court in Massachusetts. Held, a forfeiture under sec. 3 of said act of June 28, 1809, will overreach a *bonâ fide* sale to a purchaser for valuable consideration, and without notice of the offence. Her offence was in not giving the bond the section required. She returned to the United States, and before seizure, was sold as above. On this ground the District Court restored her; and the decree of this court was affirmed in the Circuit Court; but the decree was reversed in the Supreme Court, and the Mars adjudged forfeited to the United States.

§ 4. In the case of the United States v. 1960 bags of coffee, Judge Story, after a full examination of the case &c., said, on the whole I have come to the result, "that a forfeiture attached to a thing conveys no property to the government in the thing, until seizure made, or suit commenced;" "that previous to that time, the owner has the exclusive right of possession and property, though the government may be considered as having an inchoate title or possibility; that against the offender or his representatives, upon seizure or suit, the title, by operation of law, relates back to the time of the offence, so as to avoid all mesne acts; but as to a *bonâ fide* purchaser for valuable consideration and without notice of the offence, the doctrine of relation does not apply so as to divest his legitimate title." On the whole, this appears to be the true ground, and the best supported by the authorities, by the reason, and certainly by the equity of the cases. See 13 Mass. Rep. 182. Not forfeited till seized in case of an election.

Ingersol v.  
Jackson.

7 Cranch,  
424,  
Williams &  
al v. Arm-  
royd & al.

§ 5. A foreign condemnation conclusive of American neutral property, though founded on the unjust French Milan edict. As where an American vessel and cargo of Williams was captured at sea, Aug. 20, 1809, by a French privateer, and carried to St. Martins, a Dutch island, and there sold by the governor's order on the captor's request, and part of the cargo purchased and sent to Armroyd & Co. in Philadelphia, after the sale; vessel and cargo were condemned by a French prize court, sitting in Guadaloupe, professedly for a violation of the Milan decree, in trading to a dependence of England;—she had been to Martinico, possessed by her. The original American owners claimed the goods, on the ground the condemnation was void, because on a French edict, made in violation of the law of nations; and so held by Congress. But our court

held, 1. That this condemnation was conclusive, proceeding *in rem*, as to the thing itself, and changed the property: 2. No court of co-ordinate jurisdiction can examine that sentence; so the question as to its conformity to general and municipal law can never arise: 3. By the St. Martins sale, before condemnation, said prize court had not lost its possession of the thing, as the sale was friendly and not adverse to the captors, and the possessors held it under them: 4. The capture being made for the government, the condemnation related back to the capture or seizure: 5. As an erroneous judgment binds the property on which it acts, so this decree; and advantage of the defect "can be taken only in a court which is capable of correcting it:" 6. But Congress (as it might have done) had not declared this foreign decree void; our executive had also held the Milan edict a violation of the law of nations: 7. Said French prize court had jurisdiction.

CH. 224.

Art. 11.



§ 6. Rule of damages for illegal seizure by privateers of a neutral vessel and cargo.—Libel in the District Court of New-York for a maritime trespass, stated that the Amiable Nancy and her cargo belonged to the libellant, Peter Joseph Mirault, of Port-au-Prince in Hayti, and she sailed thence Oct. 1814 to Bermuda, and going to that place was obliged, by stress of weather, to bear away for Antigua to refit, and again to proceed on her said voyage, and, when sailing to Antigua, was seized by the armed boat of the American privateer Scourge, owned by the defts. and plundered of her papers &c. and the libellants of sundry articles named, without cause,—and other facts. Defts. in their answer admitted they owned the Scourge, that her boat boarded this neutral schooner, supposing she was an enemy, "and that some improper acts were committed by some of the crew;" but denied their responsibility therefor; the boat's crew plundered, not restrained or forbidden by their officers, though they saw it, &c. Held, 1. To be a case of gross and wanton outrage, without excuse: 2. That the District Court had jurisdiction of this suit "by virtue of its general admiralty and maritime jurisdiction," independent of the prize act of June, 1812: 3. Actual wrongdoers in such a case are liable for exemplary damages; but such owners only for the actual loss sustained, assessed in this case at \$2879,64: 4. Not liable for an injury to the cargo not occasioned by said acts: 5. Nor for the loss of probable profits to be gained. Decree of the Circuit Court reformed according to the principles above stated.

3 Wheaton's  
R. 546, The  
Amiable  
Nancy.

§ 7. Vessel forfeited and seized for violating the act of Congress of Dec. 31, 1792, sec. 27 &c. for registering and recording ships and vessels. Said section is in these

3 Wheaton's  
R. 601, The  
Neptune.

CH. 224. words, "that if any certificate of registry or record shall be,  
 Art. 11. fraudulently or knowingly, used for any ship or vessel, not  
 then actually entitled to the benefit thereof, according to the  
 true intent of this act, such ship or vessel shall be forfeited  
 to the United States, with her tackle, apparel, and furniture."  
 Held, this provision applies, as well to vessels which have not  
 been previously registered, as to those whose registers have  
 been previously granted. Where a sea letter is equivalent to  
 a register, 8 Johns. R. 307, 321, to prove American prop-  
 erty.

1 Wheaton's  
 R. 125.

§ 8. A prize captured and recaptured, and again recap-  
 tured, belongs to the last captors; and the possession which  
 is gained by capture is completely lost by recapture.

1 Wheaton's  
 R. Appendix,  
 § 407.

§ 9. The rule of 1756 &c. so called from being then first  
 adopted by the English, in a war between them and the  
 French, who, on account of their inferiority at sea, could not  
 well carry on, in their own ships, their commerce and naviga-  
 tion, between France and her colonies in the West Indies &c.  
 and to avoid captures by the English, gave special passes or  
 licenses to Dutch vessels to carry on the navigation and com-  
 merce, but to the Dutch exclusively. The English captured  
 the Dutch vessels so employed, on the principle they were  
 incorporated into the French system, and to be treated and  
 seized as transports, employed by France,—by her enemies in  
 the war. And the United States, then English colonies, of  
 course adopted this rule or principle, and also seized, by  
 their privateers, such Dutch vessels. Of the commerce and  
 navigation, France always had retained a monopoly in time  
 of peace, and whenever she could manage it with safety, in  
 French vessels. These Dutch vessels were clearly identified  
 and used in furtherance of the interests, views, and purposes of  
 France, though they traded on their own account, but by their li-  
 censes exempted from seizures by French cruisers for sailing  
 and trading contrary to the navigation laws of France. On the  
 same ground of adoption, not only neutral transports, employ-  
 ed by an enemy to carry troops &c., but to carry despatches,  
 are viewed as liable to seizure, as are neutral vessels which  
 resist search, break blockades, and carry to enemies contra-  
 bands of war. In all these cases the property is considered,  
*pro hac vice*, as enemy's property, and "so completely identified  
 with his interests as to acquire a hostile character." This rule  
 of 1756 lay dormant through the war of the American revolu-  
 tion; but was revived in the war of the French revolution;  
 or rather a much broader ground of capture was adopted by  
 the English. On this ground they interdicted the neutrals,  
 during war, "all trade not open to them in time of peace,"  
 though they used no licenses or passports of protection, and

though such trade had been usually open to them in war, and without objection. It was this broader ground the United States objected to, and a still broader ground also, which did not allow them to bring the produce of a French colony from it to the United States, and carrying it to France, without actually landing it and paying the duties on it in the United States, as in the case of the *Essex* in 1805, or about that time. This more extended rule also interdicted to neutrals all traffic on the coasts of an enemy. After these licenses to Dutch ships, so employed, were, in the war of 1756, discontinued, the English continued to capture them, on the presumption adopted and naturalized by France, as by her standing laws none but French vessels could be employed in such colonial trade. See pages 514 to 521 very valuable extracts on this subject from the memorial to Congress from the merchants of Baltimore &c. in 1806, by which it clearly appears, that in the war of 1744, and in the American war, Great Britain assumed no such right of capture as even that claimed under the rule of 1756.

CH. 224.  
Art. 11.

§ 10 In this case of the Copenhagen the captors claimed condemnation: 1. on the rule of 1756, "because it is allowed that the ship was destined, with her cargo, to the island of Guadaloupe and no other place:" 2. On the rule the English relied on in the war of the French revolution, "because it is contrary to the established rule of general law to admit any neutral ship to go to, and trade at, a port belonging to a colony of the enemy, to which such neutral ship could not have freely traded in time of peace." This and other neutral ships were captured by the English in the year 1780 and condemned at St. Kitts, but Jan. 22, 1782, were restored to the neutral owners by the lords of appeals in England.

Copenhagen's case, 1 Wheaton's R. 517, &c. A. D. 1782.

§ 11. This was a Danish ship called the *Vervagting*, laden with a cargo of dry goods and provisions in the American war, and she was bound on a voyage from Marseilles to Martinico and Cape François, where she was to take in a cargo for Europe of West India produce:—were captured. The ship was not proceeded against. The cargo was finally condemned as enemy's property, (as in fact it was,) and freight was allowed generally by the said lords of appeals. This was a strong and decided case, a direct voyage between France and her colonies made by neutrals in the American war, and the decision in the highest English court of prize completely legalized the voyage. Many like cases were so decided. To explain away these decisions, the English said that France, early in the American war, declared she opened her colonial trade permanently to neutrals; but she in fact restored it to its former state near two years before these decisions were

1 Wheat. R. 518, *Vervagting's* case; decided A. D. 1786 &c. said Memorial.



CH. 224. made. But it is well doubted if France ever made such a declaration. See cases at common law on this subject ;  
 Art. 11. Berens v. Rucker, 1 W. Bl. 313 ; cited Ch. 40, a. 9, s. 8 ;  
 ~~~~~ Brymer v. Atkins, 1 H. Bl. 191. Several other such and admiralty cases cited, 1 Wheaton's R. 527 to 535.

2 Wheat. R.  
 30 to 34, The  
 Appendix.

§ 12. Transfer of enemy's ships during war to neutrals is generally legal, though often suspicious. But a fair purchase must be clearly proved by the evidence usually to be expected in the case. The sale is held collusive if the ship after it be used habitually in the enemy's trade, or by an enemy. This neutral right of purchase extends only to merchant ships of enemies, not to his ships of war. So the sale must be absolute and not conditional. Cites 1 Rob. 133, 137 ; 4 Rob. 31, 100 ; 6 Rob. 71, 396. Nor can enemy's goods or cargo pass to a neutral *in transitu*. 1 Rob. 107, 114. Nor if there be imminent danger of war ; and property is still *in transitu*, if ultimately destined to an enemy, though carried to a neutral port, and the ship is there changed. 4 Rob. 207.

Principle  
 considered.

§ 13. *The owner's property how seized, or not, while in the care of others.* This matter is noticed here merely to state a principle, the result of all the cases of the kind ; for it will be observed, that in many of the cases before stated, the property was seized, when not in the immediate possession or care of the owner of it, but when in the immediate care and keeping of others, as of his ship-master, his agent abroad, &c. whether seized at sea or elsewhere. The principle is this :— the owner's property is seized for some offence of his in violating some law and as a punishment ; yet one can be punished *criminaliter* but for his own offence. The case then must bring the offence to the owner himself to justify the punishment, the seizure and condemnation. When the acts that justify the seizure are done at a distance from him, he cannot on account of them have his ship or cargo &c. rightfully seized, but on the ground of his assent to those acts expressed or implied. In several cases the law ever implies it, as of blockades and contrabands, but unjustly sometimes. The general principle is, that the principal is answerable for his agent's acts even in cases of seizures, but on the ground stated not only *civiliter* but *penally*, to the amount of the property entrusted to him. This principle is certainly a severe one when applied to the owner, in fact innocent, and where the agent's acts are to every intent his own. So is the moral sense of mankind. This severity is but little mitigated by the remedy the law gives the owner whose property is seized, against his agent unauthorized causing the seizure, as the remedy is often a name only. Hence, the modern sense of mankind limits the seizure as much as can well be done.

Therefore, if clearly proved the master puts unlawful goods on board, and that the owner of the ship is wholly ignorant of the fact, she is not to be seized. So if A own the ship and B the cargo, the acts of A's master do not generally bind B; and if such as to subject her to seizure, they do not bind B's cargo, where such acts are unknown to him, and the master is not his agent. In some of these cases of seizures even as prize, the common law principle is applied, and the master's act binds not the owner of the ship, unless the act be within the limits of the master's authority, or some statute subjects her to seizure expressly. One instance among several—I place my master in my merchant ship, and without any commission he makes a capture, he alone is liable.

CH. 224.  
Art. 12.

There is an important distinction as to the presumption against the owner of ship or cargo, viz. he is presumed to know (and no evidence can be to the contrary) every fact that exists when the voyage commences, as an enemy's license, simulated papers, and other causes of seizure; but not a fact taking place after the ship has sailed, and on the ocean; as in this case the fact itself will prove his ignorance, and there is no danger of fraud in proving it, as in the said case of an uncommissioned capture; but otherwise, had the master sailed with a commission to capture. This distinction, on the whole just, will be found to exist in scores of case. These principles affecting owners and masters of vessels, principals and agents, in relation to seizures, apply to cases extremely numerous, and the laws and statutes and judicial decisions in them are almost without number, and can be here referred to but generally. Many of them will be found in the cases before stated in this chapter:—many in cases of insurance in Ch. 40:—many in cases of captures:—many in cases of estates by forfeiture, Ch. 136:—several in cases of penalties, Ch. 148:—a large number in the Reports of Dallas, Cranch, and Wheaton; also, in Robinson's Reports; so in Lee and Wheaton on Captures, and in many other books, both English and American.

ART. 12. *General rules of proceeding in cases of seizures.* So very numerous have the reported cases become in the English and our books on this subject, that only a summary sketch of them can be made in this article; nor will it be useful to add much to what is already done in prior chapters. The attentive reader will see many rules of proceeding or practice included in cases of seizures and captures stated in various chapters, especially in Ch. 227, s. 1 to 76, in which the grounds and principles whereon enemy's property has been seized are stated; also in Ch. 186, a. 5 to 9, (admiralty jurisdiction;) and in this chapter also, in which the grounds are stated in which property not enemy's has been seized as

As to prize courts, see Admiralty Jurisdiction, Ch. 186, a. 5 to 9; and Captures, Wheaton on Captures, 258 to 296.—Letter &c. to Mr. Jay from Sir W. Scott &c.

**CH. 224.** forfeited. In these cases stated there may be found various rules of practice and proceedings. These rules will be attended to in their natural order, briefly stated, and the cases to support and illustrate them referred to.

**Art. 12.**

Wheaton on Captures, 32 to 38.—  
2 Wheat. R. 77; and a. 2, Marten's Law of Nations, 8th book.—  
5 Rob. 369.—  
4 Cranch, 27.  
—Letter of Sir W. Scott & al. to Mr. Jay—Chitty's Law of Nations, 303.  
—Wheaton on Captures, 320.—1 Rob. 22, 86, 89, 196, 189. Le Caux v. Eden, Talbot v. Janson, Maley v. Shuttuck, ante.

§ 1. *Seizing enemy's property; also the thing forfeited, (not including lands)* In seizing an enemy's property at sea, though not in fact such, the captor is always justified, commissioned or not, if there be probable cause for seizing it, or sufficient reasons to think it is such; but the captor, if not commissioned, does not seize enemy's property to his own use. Every seizure is made at the seizer's peril, where not specially protected by municipal law or special stipulation. The peril is restitution, and often costs and damages. If not enemy's property, restitution follows; but damages and costs only when there was not justifiable or probable cause. See probable cause or not, art. 7, s. 2, 6, a. 8, s. 1, a. 10; several other cases of captures in this chapter, allowed to exist or not. 9 Cranch, 449; 4 Inst. 152; 3 Cranch, 131. The causes of suspicion which will create probable cause, in their nature must be numerous; as the defective state of the ship's papers, her situation as to her avowed port, the nature of her cargo, the character of her crew. As if the papers be false or colourable, or some thrown overboard; if the officers and men in testifying, grossly prevaricate;—if some proper papers be wanting; if her destination be untruly stated;—if her neutrality be doubtful;—if the voyage be illegal, or to or from a place blockaded;—if the officers and crew disagree as to the owners and other matters usually known to all; and in other such suspicious cases, the captors may often have costs, though restitution be ordered. But if a seizure be made without probable cause, they may be liable to damages and costs; on account of which security is required in all cases. As to the measure of damages, see 3 Rob. 235; 2 Wheat. R. 327; 3 Cranch, 458; 5 Rob. 145; 2 Cranch, 64; 1 Gallis. 315. As to who is liable to pay them, see several cases this chapter; and 1 Rob. 179; 3 Rob. 129; 1 Edw. 84.

§ 2. *Seizures of property forfeited by subjects &c. rest on the same principles.* The seizure must be by one having a right to seize at common law, or under some statute, order, commission, or warrant; and he seizes at his peril, if not so protected. If the thing be not forfeited, the seizer must restore it all cases; but whether liable to damages or not depends on probable or no probable cause. See various cases in this chapter. And if without, he pays costs and damages. Letter of Sir W. Scott &c. to Mr. Jay.

If the proceeds of a prize be in the marshal's hands, the parties entitled to them may use in the admiralty, or at law for money had and received.

Sept. 10,  
1794.

Wheat. on  
Cap. 287.

§ 3. Whoever seizes a thing as prize, or as so forfeited, takes it into custody. He must put it into a proper place of safety, and keep it with reasonable care, *aliter* he will be liable for any loss or injury arising for want of such care and custody. Whenever his seizure is justifiable he has a *bond fide* possession, and is not liable for mere accidents or casualties. The misconduct which will make the seizer liable as a trespasser *ab initio*, may be in hundreds of different ways, enumerated in some degree in the foregoing chapter, in Lee on Captures; Valin; Emerigon; Chitty's Law of Nations; Wheaton on Captures; 2 Wheaton's R. Appen. 9, 10, 11, 17; especially in Robinson's Reports. Usually in the United States the marshal on warrant takes possession, and for his negligence he is accountable to the court. 2 Wheat. App. 17. He holds it for the court. Id.

§ 4. The seizer having the thing seized in a proper port, or place of safety, his duty then is, forthwith to cause legal proceedings to be instituted, in order to have the legality or illegality of the seizure judicially decided in the usual course of judicial proceedings. To this end he ought without delay to lay before the proper judge or person all papers he has on the subject; and also, to have before him the proper witnesses, that their testimony may be had in due form, that is, if a capture at sea all the evidence found in the captured vessel, all the papers and all or part of her crew. This is the usual evidence in the first instance, and on this the first hearing may usually be. But as it is clear the property captured may be proved to be enemy's in hundreds of different ways, as the facts may be, so it is obvious that the best evidence in the case to be had may vary in as many ways as the various cases of captures; and whatever observations may be made as to evidence in prize cases, surely when there is a serious dispute between the contending parties, if enemy's property or not, inferior evidence, which supposes better kept back, or not produced, when to be had, can no more be proper in prize than in other cases. This rule, of all rules in matters of evidence, can never be dispensed with in real controversies, and in relation to the material fact in a cause on which it turns.

§ 5. But if the seizer have in custody a vessel or other thing, seized because forfeited by subjects or citizens, he must so proceed, and without delay, file his libel or information for condemnation, and have his best evidence to prove the forfeiture. Their property is not to be arrested from them, and kept in legal custody before trial, a day longer than is absolutely necessary, nor is the friend's or neutral's, when seized. The first hearing on evidence alone, that may, nine times in ten, be of no real importance in a disputed case,

CH. 224.  
Art. 12.

4 Cranch, 2.  
—2 H. Bl.  
533.—See  
general form  
of a libel,  
Wheat. on  
Captures,  
376, 379, 380.  
—2 Dallas,  
23.

CH. 224. is founded on a bad rule. As the forfeiture of a ship or other  
 Art. 12. thing, in the numerous cases of forfeitures, may be proved in numerous ways, as facts may happen to be, and the evidence to prove them may happen to exist, so the best evidence to be had in any case, to prove the forfeiture, may obviously vary in as many different ways. Yet one rule of evidence runs through all the cases for such forfeitures, in this manner. Some statute or known law declares, that if any person or persons do, or commit, or omit an act or acts, specified and defined, his or their vessel, or other thing described, shall be forfeited. Now this rule is, to produce, in every case, the best evidence to be had, to prove the person or persons accused, have done or committed, or omitted the very act or acts thus specified and defined. What is this best evidence, usually is a matter of sound judgment, and legal knowledge, and depending on the general rules of evidence, less rigidly adhered to when the judge tries the fact, the more so, when the jury try it. The best evidence summarily digested to these purposes of proving or disproving enemy's property or forfeitures, will be found in Lee and Wheaton on Captures; in the Appendix to Wheaton's second volume of Reports; in Chitty's Law of Nations; Marten's Law of Nations, book 8, all but Lee's late authors. See also many cases from such in the chapters, articles, &c. in this work, as to captures, seizures, and admiralty cases. As to the evidence, in detail, relating to this subject, it is found in many books in many cases of captures and seizures.

1 Wheat. 439. If it be necessary for the Supreme Court of the United  
 The Elsinour. States to inspect and compare original documents, it will order them to be sent up from the court below.

§ 6. By the next general rule, a claim (if any) of the property seized, must be put in as soon as practicable, by the claimant, after he has legal notice of the libel filed for its condemnation, at furthest within the time assigned him in the court's monition to him. Generally the claimant files his claim to the thing seized and arrested from him on oath, which entitles him to it, if he be neutral or friend, and swears it is his, if there be no evidence, it is not. It is the right and duty of the captor always to libel it in a prize court of his own country, at any rate in no other but that of an ally in the war. Prize courts are established in every nation, and there is a code of laws common to all, regulating proceedings in them, which are *in rem*. If in any case against the person, he has personal notice, or by publication; if *in rem*, notice is served on the thing itself. This is notice to every one having an interest in it, but to no others. Hence every one in the world having this interest, is a party in the cause, and has construc-

Wheaton on  
 Captures,  
 277, 278, &c.  
 311, 312,

tive notice of the seizure laid in the libel, and may well put in his claim *in rem*, support it, and appeal, and is forever bound by the final sentence, though not one who is not interested in it when notice is so served. Every country sues in the prize courts of the others, all governed by the same rules, equally known to all. They are open to every claimant, thinking he has an interest in the thing libelled, seized *jure belli*, at sea, or on land by a naval force, or that jointly with a land force, (if not excluded by statute;) and he may file his claim, stating his right and defence, and even have a monition to the captors, where dilatory, citing them to proceed to adjudication; and if the property be lost, he may so proceed for damages, proving a right to them; and to damages he has a right, whenever his neutral or friendly property is seized, without probable cause, misused, or not duly preserved after seized. 1 Cranch, 101; 3 Dallas, 333; 2 Cranch, 64; 1 Gallis. 315; 1 Rob. 287; and even demurrage, if they be dilatory; 6 Rob. 10; 4 Rob. 71. 185. The *onus probandi* is on the claimants, to prove neutral property. This done, the captors must prove *probable cause*. 3 Cranch, 458. It is agreed the insurers and assured of a vessel have an interest that entitles them to claim, but not a mortgagee not in possession, or one having a mere lien for a debt.

§ 7. The next general rule of proceeding relates to farther proof;—this is common in courts in which there are no juries. In prize causes, the first hearing is usually had on the evidence taken in *preparatorio*, and the captured vessel's papers. In *preparatorio*, being the examination of the persons captured in her, on the standing interrogatories; on which the condemnation ensues, if no claim be filed, of course; and is conclusive on the thing libelled, against all interested in it as above. But when a claim to it is filed, claiming friendly or neutral property, and denying enemy's, farther proof becomes necessary, such as the court will specify, or sometimes as the party or parties choose; but in many cases the court will deny farther proof, as where it contradicts the preparatory evidence; Wheaton on Captures, 282; (but *quære* if that be apparently false,) as where the party appears to be guilty of fraud, or conduct not neutral. And the misconduct of one partner affects all his copartners. As where a general agent of a neutral cargo covers enemy's property in the same ship, though without his principal's knowledge; but his property is condemnable, though distinguishable. It is at the court's discretion to allow either or both parties to produce further proof.

§ 8. As there are many cases in which the law presumes the property enemy's, the neutral claim often wants the most evidence. As where there is a total want of evidence to

CH. 224.  
Art. 12.

3 Cranch, 458.  
—4 Cranch,  
2.—4 Rob.  
161, 185, 214.  
—1 Edw. 50.  
—3 Dall. 333,  
cases of the  
Eleanor and  
Anna Maria,  
ante.—9  
Cranch, 244,  
256.—8  
Cranch, 335,  
418.

Wheaton on  
Captures,  
281 &c. 311,  
312.

Wheaton on  
Captures,  
283.—Appen.  
28.—Wh.  
24, 25, 26,  
27.

**CH. 224.** prove it neutral. Said letter to Mr. Jay. So if found in an enemy's ship. Grotius, B. & P. lib. 3, c. 6. So if in the ship's papers, goods coming from an enemy's port, are stated "for neutral account," designating no title in any one, farther proof must be had. If goods fall within the contraband description, so is the presumption, and the claimant's evidence must prove the contrary. 4 Rob. 79, 242. So a ship captured and carried to an enemy's port, then found in a neutral's possession, the presumption is she was condemned, and the claimant must prove the contrary to have her restored. 263. If the voyage be from one enemy's port to another, and further proof is required, the double correspondence of shipper and consignee is required; but only of the shipper, if from an enemy's to a neutral port. 5 Rob. 231.

The claimant's further evidence is general,—affidavits and documents; or is by plea and proof; Wheaton on Captures, 283; and generally it must be applicable to the original evidence in the case, *Id.*

§ 9. On further proof ordered, the attestations of the claimant himself, and his correspondence with his agents, is evidence to prove his property. So are, on further proof, the affidavits of the captors, not released, to prove facts within their knowledge. 1 Rob. 340; 1 Gallis. 401. And see *Captures and Evidence*; but 9 Cranch, 368. But generally the persons interested in the suit cannot be witnesses but of necessity, or when their interest is released, and sundry other cases. 2 Wheat. App. 24, 27. For except in cases of necessity, the general rules of law must be applied as to competency. *Id.* Whenever further evidence is ordered, and affidavits are to be taken in a foreign country, the Supreme Court of the United States issues a commission for the purpose. 2 Wheat. 371. And it is the practice of this court, in prize causes, to hear the cause in the first instance, on the evidence from the Circuit Court, and to decide on it, if proper to allow further proof. *Id.* 372. It is a general rule not to issue any commission to an enemy's country. As to several other cases in which further proof has been ordered or not, see this chapter, a. 8, s. 1; a. 9, s. 6; a. 9, s. 7, 10, 19, 22.

Said letter to Mr. Jay,  
1 Rob. 22, 36,  
93.—2  
Cranch, 102,  
note.—4 Rob.  
120.—6 Rob.  
142, 316, 376.

§ 10. *General rules as to costs and expenses in cases of seizures.* It is an invariable rule, the United States pay no costs,—nor do public officers or even seizers, where there is clearly probable cause for the seizure. As where the property seized cannot be acquitted or restored without further proof; or wherever the evidence alone, under which seized, would condemn it;—as where the evidence found with it, at sea, does not prove its neutrality;—or papers are false or spoliated, or thrown overboard, not occasioned by the wrong conduct of

the seizors;—or where any part of the thing seized is condemned;—where any contrabands are on board, or the vessel comes from a place blockaded. See art. 9, s. 10. 17; art. 11, s. 6. CH. 224.  
Art. 12.

§ 11. The seizors have costs and expenses in many cases in which the property seized is restored, on the ground the seizure was justifiable when made, and proper clearly to be made, as the evidence stood at the time and place of seizure. See several prior cases in this chapter; also Ch. 33, Freight; also Ch. 227, Captures; as if the ship be sailing under false papers, apparently to a port forbidden by some law of war, of nations, of non-intercourse, &c., or where she is deficient in papers, where those who possess, at the time, the property seized, equivocate, and give contradictory accounts.

§ 12. As to the amount of expenses &c. to seizors and to claimants, they are very much in the discretion of the court; and often, if any at all, they are generally the actual expenses incurred in consequence of the misconduct of the party paying them, and all the equitable circumstances of the case considered. Captors and seizors pay costs and damages to claimants, if they make unjustifiable seizures or detentions, (understood without *probable cause*.) So claimants pay them if they clearly make groundless claims;—so if “the seizure is justifiable on account” of their fault or misconduct, though they have restored the thing seized. In case of condemnation, the costs, expenses, and duties, are usually first deducted out of the proceeds of the property seized and condemned.

*Probable cause.* This is very material as to costs, and especially as to damages. See where *probable cause* has been considered in preceding cases, particularly in a. 3, s. 11; a. 7, s. 2; a. 8, s. 1, 2, 16, 18; a. 10; a. 12, s. 1, 2, 6.

§ 13. *Joint seizures.* Seizures may be made by two or more vessels jointly, as well of enemy's property as prize, as the property of subjects or citizens, as forfeited for violating treaties or municipal laws, as non-intercourse, embargo, and other acts. In both cases, in the division of the thing seized, joint seizors must, in most cases, share according to established general rules, and their strength, and this also ascertained by general settled rules. Such divisions, however, are most common in prize-seizures of enemy's property. The first general rule is, that a seizor, to share in the thing seized, must be in a situation to influence the party submitting to yield, otherwise he has no hand in the seizure. Second general rule is, that to this purpose this party seizor, to have such influence, must be in sight of the party seized, or known to him to be in chase, endeavouring to assist in the seizure,

3 Rob. 167,  
330.—1 Gal-  
lis 445.—9  
Cranch, 126,  
151.—See a.  
9, s. 10.—1  
Edw. 70.

Said letter to  
Mr. Jay.—5  
Rob. 68.—4  
Rob 17, 39.  
—Wheaton  
on Captures,  
285, 286.



CH. 224. either actively or constructively. Third general rule, that seizers, whose public duty it is to exert themselves and seize, are presumed to do their duty *prima facie*, though no motions to such purpose be in fact proved, if no evidence to the contrary. Fourth general rule is not so as to private seizers, who interfere solely on the ground of private interest, and have no such public duty. They, to share in the thing seized, must prove actual influence, and being in sight or chase,—so known, and motions actually made, and known to assist, there is no such presumption in their favour. See *Du Ponceau v. Bynker*. Q. J. Pub. p. 144, 146; 6 Rob. 261; 5 Rob. 41, 124, 268, 339, 349; 3 Rob. 1, 52, 194, 211, 311; *Marten on Captures*, 91; 2 Rob. 16, 55, 65, 274, 284; 4 Rob. 153, 318, 327.

Wheaton on  
Captures,  
287 to 293.  
—*Talbot v.*  
*Three Brigs*,  
1 Hall's L.  
J. 266.—1  
Dallas, 93.

1 Dodson, 9,  
28. 61.—2  
Dallas, 37,  
174.—Ch.  
227, s. 26.

Dodson, 9,  
61, 346, 368.

Duckworth  
*v. Tucker*.—  
*Horne v.*  
Camden.

Act of Con-  
gress, April  
23, 1800;  
other rules in this act.

But even as to a privateer it is sufficient a joint chaser pursue with intent to aid in the seizure, proved by her motions, though not actually concerned in boarding or seizing. One may be pursuing, and another actually seize, and the first be entitled; but not if she discontinue her chase before the seizure. 6 Rob. 261. One beaten off, but in sight, with intent to aid, is entitled. 5 Rob. 124. A privateer merely in sight, but making no movements to assist, is not entitled. 3 Rob. 52, 346. How far a public ship must be in sight, or when, or co-operating, 2 Rob. 16; 3 Rob. 194. In taking a fort &c. land armies, to share, must actually co-operate, or actually influence the enemy to surrender. 2 Rob. 55. And in all these cases the assistance must be material. 2 Rob. 65. If those claiming as joint captors abandon all designs to seize, they have no share. 6 Rob. 261. A convoying ship may be a joint captor. 3 Rob. 1, 9, 211; 5 Rob. 41; 4 Rob. 327; how by boats, *Id.* How associated vessels share, 3 Rob. 311; how all concerned in a blockade, *Edw.* 6, 124; 3 Rob. 311; 5 Rob. 92, 349;—as to transports, 2 Rob. 274, 284;—as to land and naval forces jointly acting, see *Rodney v. Lindo*; also 5 Rob. 349;—how as to an ally, 2 Taun. 7. The claim of a joint-captor may be filed any time before a decree made, ascertaining who are the captors, *Id.*; and even pending an appeal, 2 H. Bl. 533; 9 Cranch, 209;—but after an appeal, a new claim filed in the Supreme Court will be remanded with the cause. Joint seizures are not settled by affidavits; the joint seizer must state facts in his claim filed, which, if true, will entitle him to a share, and the other captor may file a new allegation. If not sufficient, if true, to entitle the joint seizer, his claim is at once rejected. 3 Rob. 1; 5 Rob. 124, 148, 268; 6 Rob. 244; 4 Rob. 381.

This act fixes the proportions of joint captors in public ships; that is, "according to the number of men and guns on

board each ship in sight." By a customary rule, privateers share according to their relative strength; usually ascertained by computing the number of men and weight of metal in each; or of late years in the United States, by the number of men only. So also in England,—decided in a joint-captor's action against an agent who had received the proceeds of all the prizes taken by both ships. Cites *Wemyss v. Linzee*, 620; *Le Caux v. Eden*; *Cornu v. Blackburne*, 594; *Lindo v. Rodney*, 641; *Anthon v. Fisher*, 613; all in Doug.; 2 Gallis. 1. So if an ally assist. 2 Taun. 7. Same rule in cases of public and private vessels. 2 Rob. 284, 285; 4 East. 238; 1 H. Bl. 261, 265; 3 Bos. & P. 257; 6 East, 220; 3 East, 502, *Holmes v. Rainer*; also Ch. 227, s. 56; *Decatur v. Chew*, Circuit Court, Boston, October, 1813.

CH. 224.  
Art. 12.

Dougl. 311,  
Roberts v.  
Hartley.—  
Ch. 227, s.  
53, 55.—4  
Rob. 362.

Harvey v.  
Cooke.

§ 14. The result of all the cases reduced to one view is, that where a vessel or thing is seized by force, by two or more, each to be entitled to a share of it, must prove, 1. He had an influence, actually in some way inducing the parties seized to surrender: 2. That he is entitled to a share by contract; as a contract to make common stock &c.; as being under one association &c.: 3. That each, when entitled to a share, has one according to his relative strength, not otherwise regulated by statute; usually, but not always, his relative number of men employed in relation to the seizure: 4. Whenever one does not immediately seize the thing, but his influence and co-operation are in any degree remote, he has the *onus probandi* to prove his right to share, and to show how he assisted.

§ 15. *The decree and final disposal of the thing seized.* In every case in which a vessel, or any specific property is seized, as a forfeiture for some offence, or as a prize of war, the court must proceed and decree *in rem* to acquit and restore it, or to condemn and dispose of it to the party to whom forfeited, or to whose use captured or seized. It is, therefore, that the court, in the first instance, must necessarily have this specific thing so far within its power and custody, as to have, by law, the final disposal of it; in order either to restore the thing itself, or to cause it to be delivered to the seizer, or to whom forfeited; or to be sold and delivered to the purchaser, and its proceeds paid to the seizer, or to whomsoever forfeited. It is, therefore, also, the court can well proceed in the absence of a party directly interested in it, as the enemy whose property is captured or seized; as the offending subject for whose offence it is forfeited, and who flies his country; or where a party dies, *pendente lite*, (though usually best to call in his representative;) and because in thus proceeding *in rem*, it is the peculiar duty of the court to see justice done to

CH. 224. every party, even the enemy. The court may first, by an  
*Art. 12.* interlocutory decree, settle the main question, whether the thing  
 is forfeited, or is legal prize or not;—afterwards proceed to  
 dispose of it, and to ascertain, by itself or commissioners hear-  
 ing the parties, damages and costs. But though the proceed-  
 ings are thus mainly *in rem*, yet sometimes they are necessa-  
 rily *in personam*; as where the specific thing itself or its pro-  
 ceeds gets into the actual possession of some person or per-  
 sons, and it is necessary to the final disposition thereof to have  
 either brought, by such person or persons in the actual cus-  
 tody of the court; as in the great case of *Smart & al. v. Wolf*,  
 Ch. 33, a. 3; as in *Home v. Camden*; and other cases; 6  
 Rob. 142, 194, 282; 2 Taun. 7, *Duckworth v. Tucker*; 1  
 Gallis. 315, 545; 2 Gallis. 19, 78, 92; 1 Rob. 221, 286,  
 303, 325; 2 Rob. 152, 77, 211, 284, 372; 4 Rob. 41, 262,  
 282, 355, 494; 5 Rob. 173, 224, 280, 291.

11 East, 619,  
 said letter  
 to Mr. Jay.—  
 1 Dodson,  
 200—3 Dall.  
 117.—Hall's  
 Am. L. J.  
 145.—8  
 Hall's Am.  
 L. J. 183,  
 145.

Act of Con-  
 gress, Jan.  
 27, 1813.

When they that are entitled to a part of the property seized  
 against the former owner, possess it, the court will issue a  
 monition against them personally, to pay the damages assess-  
 ed, and also against their sureties. 5 Rob. 291 In the  
 United States sales of prizes are made by the marshal, on a  
 warrant from the court. So of a thing seized, as forfeited,  
 where a sale is necessary, as of fruit &c. run and seized, in a  
 perishable state.

Act of Con-  
 gress, June  
 26, 1812.

Stewart, 9,  
 513, 517.—2  
 Gallis. 78, 92.

§ 16. By this act prizes are decreed to the owners, officers,  
 and crew of the privateer, and the proceeds divided But if  
 they forfeit their right to a prize, as they may for misconduct,  
 by the old law of the admiralty as well as by statute, then it  
 may be seized for the government, and disposed of accord-  
 ingly by the court's decree. See the case of the *Bothnea* and  
*Jahnstoff*, a. 8, s. 21. And this misconduct and seizure to the  
 use of the government, may be as well for violating municipal  
 as national law or treaties. *Id.*; the *Venus*, a. 9, s. 5, 8; 4  
 Cranch, 277. How property taken as prize, without a com-  
 mission to take it, or by a foreign cartel trading, may be  
 seized and adjudged to the government's use, see cases be-  
 fore cited; also *Du Ponceau's Bynker*. 155, 162; *Grotius*  
*B. & P. lib. 3. c. 6*; the *Dos Hermanos*, 2 Wheat. 76.

§ 17. All prizes and enemy's vessels &c. to which no per-  
 sons are entitled by commission or grants from the govern-  
 ment, belong to it, and may be seized and adjudged to its  
 use. 1 Gallis. 545.

§ 18. *How the court decrees distribution*, see *Home v.*  
*Camden*, above, and 1 H. Bl. 476, 524; *Bingham v. Cabot*,  
 8 Dall. 19; 2 Dall. 36; 2 H. Bl. 633; 4 D. & E. 382;  
 2 Taun. 9;—see acts of Congress, April 23, 1800; June 26,

1812, above; 1 Gallis. 506; 11 East, 414; 13 East, 574; CH. 224. Dougl. 324; 8 D. & E. 224; 1 Dodson, 236, 436, 442. Art. 12.

§ 19. As to compelling prize agents &c. to come into court, and account for proceeds &c. in their hands, the court that condemns undoubtedly has jurisdiction See *Smart v. Wolf*, Ch. 33, a. 3. And any party interested in his own, or *autre droit*, may file a supplementary libel for the purpose; as stated, *Id.*; and in *Horne v. Camden*; and 5 East, 22; 2 Dall. 36; 3 D. & E. 323; 3 Dall. 54, 331.

§ 20. *Case of practice.* Prize cause. Property was captured and brought in for adjudication; and the national character of it was ambiguous, and no claimant appeared; held, the suit ought to be continued a year and a day after it was commenced, and if no claimant appear in that time, it is to be condemned to the use of the captors. The goods were taken out of a Spanish vessel. This period of a year and a day has been fixed by the usage of nations. By the rules of practice, a claim cannot be for the first time interposed here, (Supreme Court.) In prize causes this court has only appellate jurisdiction, confined to the cause and parties below. Remanded to the Circuit Court to proceed further, that court having dismissed the libel before the year and day expired, with directions to admit the claim of one claiming as a neutral, and with directions to allow the libel to be amended &c.

1 Wheaton's R. 298, 299, *Harrison v. Herbert*.

§ 21. Trespass for carrying away 21 oxen &c. against the collector of the port of Penobscot, for ordering said cattle seized to the use of the United States as forfeited &c. Deft. relied on the certificate of the judge of the District Court of Maine, stating there was reasonable excuse for the seizure &c. Held, this certificate had no operation to bar an action, by a successful claimant, except when the property is restored. In this case they were found not liable to forfeiture; but had been sold by order of the District Court, and after deducting charges the balance \$151.57 was ordered to be paid to the claimant. The charge was an attempt to transport said cattle to the enemy, Sept. 1814, against the statute 5 Cong. c. 128, s. 89; statute 13 Cong. c. 93, s. 7. As the cattle were not perishable articles, the court had no power to order them sold or to deduct the charges.

14 Mass. R. 210, 213, *Hoit v. Hook jun.*

§ 22. Forfeiture attaches in the officer &c. though removed before judgment. As where a collector of customs seized goods forfeited July 6, 1812, and libelled, and pending the suit was removed from office and another appointed in his place; held, the removed officer entitled, in an action for money had and received, against his successor, who had received the proceeds, as he acquired an inchoate right by the seizure.

4 Wheaton, 74, *Van Ness v. Buel*.—See Ch. 224, a. 8, s. 14.

CH. 224. § 23. Territory seized and conquered by an enemy. In

Art. 13. the war of 1812 the enemy seized and possessed the lower part of Maine : and held that during the time he kept possession it was as his country, and as foreign territory to the United States so far as respected their revenue laws ; and goods imported into such territory were not imported into them, but were subject only to such duties as the conquerer laid ; and goods so imported cannot become liable to pay duties to the United States after the enemy has evacuated such territory and their sovereignty is restored. This was an action on the bond given after the evacuation, to our custom-house officer, to pay the duties, to prevent his seizing the goods. Defts. pleaded the whole matter specially, and general demurrer to their plea.

4 Wheaton's  
R. 246, United States v. Rice.

4 Cranch, 47,  
U. States v. Willings & al.

An American ship, while at sea, was in part transferred by parol, to an American citizen, and re-sold to her original owners on her return to port and before entry. Held, she did not become liable to foreign duties. See acts of Congress Dec. 31, 1792, sec. 14, 17 ; 4 Dallas, 28 ; 4 Bos. & P. 263. And if an American vessel be sold to an alien, in whole or in part, she immediately forfeits her American privileges ; but if to a citizen, not till she neglected to take out a new register and to return the old one.

#### ART. 13. *Blockades, restraints, &c.*

§ 1. These, like embargoes, are usually restraints ; by them those in the blockaded port are detained ; so often those about to enter it ; others are merely prevented entering. Ch. 40, a. 7, s. 22, head Abandonment, where decided the blockade of the destined port is a risk within the policy and cause of abandonment,—also where the very contrary is decided ; a. 7, s. 41, what is a breach of blockade, s. 44, cases ; a. 11, s. 29, as to concealing it ; a. 17, s. 20, a mere blockade cause of abandonment ; a. 21, s. 17, 18, 19, what is a breach of &c.

3 Wheaton's  
R. 183, Oliveira v. Union Ins. Company, in error.

§ 2. In this case among other perils, insured against in a voyage from Baltimore to the Havanna, Dec. 1812, were "all unlawful arrests, restraints, and detainments of all kings" &c. The vessel and cargo were Spanish and neutral property, and regularly documented as such. She attempted to sail out of the Chesapeake, but was turned back by four British frigates, a blockading squadron ; the master protested for his owners, and they timely abandoned and sued for a total loss. This vessel also took her cargo on board and sailed before the blockade was instituted, (was detained in the bay by them some weeks.) Judgment for the assured : 1. Being stopped and turned back by the squadron, after search &c. was a restraint : 2. Unlawful, as she had taken in her cargo on board before the blockade was instituted : 3. The court had great doubts if a blockade was a peril insured against ;—is not

an "arrest," nor a "detainment." It may be a "restraint," CH. 224.  
 a restriction by external force, restraining a vessel from coming out of port. No precedent was found in the English books. Art. 13.  
 In *Barker v. Blakes* (cited above) the blockading squadron did not apply to the insured vessel any physical force; the decisions in New-York one way, and in Massachusetts the other, were noticed. If a vessel be excluded from her destined port by the law of the place, this not a peril within the policy; she is not physically restrained. *Secus* if stopped and turned back; so if kept in port, and on the principle an embargo is a peril insured against. A violation of a blockade by the master affects the ship, but not the cargo, unless the property of the same owner, or unless the owner of the cargo knows of the intended violation. 1 Rob. R. 67.

§ 3. On a view of all the various cases on this point the best conclusion seems to be this, if the blockade merely cause the master to elect to turn away from his destined port, it is not an unlawful restraint, arrest, or detainment, and so not a peril insured against; but if the blockading squadron keep him in port as an embargo does, or employs physical force against his vessel, or thereby obliges him to turn back or turn away to avoid such force, this is restraint, and a peril within the policy. Remark and inference.

§ 4. To constitute a breach of blockade by a neutral vessel, and to subject her to seizure therefor, there must be: 1. A legal blockade,—well defined in the 18th article of the British treaty of 1794, (*Jay's treaty*): 2. The neutral vessel must know of it: and, 3. Knowing it, he must actually attempt to enter the blockaded port, or come out of it, and do some act in actual violation of the blockade.

§ 5. The attempt must be unlawful. Now it is not unlawful for the neutral vessel to come out in ballast, or with a cargo purchased and laden before the blockade was instituted; nor if she be obliged by the laws of the place to take out a cargo or effects at her departure. See cases, this chapter; so *Insurance*, Ch. 40 &c. *Marten's L. N.* and cases in *Rob. Adm. R. &c.*

§ 6. 1 Rob. R. 130, it is held, that actual sailing with an intention to break a blockade is a breach of it, on p. 144.

## CHAPTER CCXXV.

## FEDERAL PRINCIPLES, AND CASES IN EQUITY.

ART. 1. *Uniform system of equity how lately originating in the United States.*

See Ch. 20,  
a. 16, s. 2.

Certain it is, that when our ancestors settled Federal America, they brought with them from England to each Colony they settled generally the principles of the *common law*, applicable to their new situations ; and in time established an extensive, valuable, and, generally, a uniform system of *American common law*;—so much so, that a lawyer, thoroughly acquainted with the common law in one Colony, since State, has ever been able to practise, with ease, that of every other. This uniformity we shall perceive in the cases in all parts of the United States brought into and decided in the Supreme Court of the United States. But clear it is, that it has not been so with the equity, or chancery system of England ; that has ever been almost wholly excluded from New-England and Pennsylvania. So far as any powers in equity have ever been exercised in these Colonies and States they have been sparingly granted in a very few cases, by their several legislatures to their courts of law ; and if we look to the other Colonies and States, which have composed the rest of Federal America, we shall see in them, nothing like a uniform system of equity or chancery jurisdiction, either in principle or extent. We must therefore look in vain for such a system in our several and numerous States. But in the constitution of the United States we have laid a solid foundation of such a system, which well provides for carrying into effect the judicial powers of the Union, in federal cases, as well on principles of equity as principles of law. The equity mentioned in that constitution is undoubtedly some uniform general code of equity ; and it is equally certain that we can find this code no where but in England, or in the English decisions in equity, we have in English books in this country. The practice in the Supreme Court of the United States in which alone such a uniform plan can grow up in our country, is in full confirmation of this opinion ; for it is in those books only it looks for authorities ; at most the exceptions are so few as not deserve attention. Clear it is that in our wide extended country, abounding in subordinate courts, and so formed are even our highest State courts in all national concerns, it must be found impracticable to establish such a uniform system in them, or in the subordinate Federal courts. It obviously results that it can be well established no where but in

this Supreme Court of the nation. In that it will slowly grow up to a high state of perfection. The judges of that court have, and probably always will have, the books, the abilities, and the disposition to build it up. It is true that court consists of seven judges, and some think equity must be administered but by one ; but this idea has no foundation in nature or experience. Not in nature, for a correct moral conscience, or sense of right and wrong, ever has been, is, and will be as uniform and steady in its office and trust, as instinct or attraction. Were it not so, there would be a great defect in the noblest part of the Deity's works. Not in experience, for examine the equitable decisions, depending on the moral perceptions of the mind, made by the Hindoo judge four thousand years ago, and the other side of the globe ; so of the Roman judge in the days of Cicero or Justinian, in another quarter of the world, and we find them made in a manner in which the moral and correct American judge now fully acquiesces. So experience, in our own country, teaches the same thing. The people of the United States when they formed that national constitution, never once attempted to place these federal powers in equity in a single judge in the dernier resort ; but placed them in a Supreme Court, never expected to consist of fewer than five judges. Experience further teaches that the judges of this court have been as often unanimous in their decisions in equity, as in their decisions in law. In relation of principles and cases in equity from the decisions of this court, it may not be necessary to go back to the very first years of its institution, when the best principles of our national system were new in some measure, and required some years for the development of them, and to reduce them into familiar practice in the different parts of a free and extended country, in which some few years were necessarily spent in studying those numerous books which contained the substance of this system in equity reduced to practice in our own language. Equity is necessarily a system of rule and discretion.—Discretion, as it depends on the particular circumstances of each case, there can be no settled rule without destroying equity itself, and reducing it to positive law. On the other hand, it is going too far to have equity without rule. This may destroy all law, and leave the decision of every cause solely in the breast of the judge. 1 Bl. Com. 61, 62 ; 3 Bl. Com. 429, 436.

ART. 2. *Our American charters, constitutions, and statutes relating to equity.*

§ 1. *Charters.* It is necessary in this work briefly to attend to these, and even the old charters of the Colonies and Provinces now included in the United States ; for though these

CH. 225.  
Art. 2.



CH. 225. charters had little or no tendency to establish a uniform system of equity throughout the whole, yet they did tend to plant the seeds of equity in some of the Colonies and Provinces, by allowing courts of equity to be instituted, and in some few professedly to be held by a chancellor. And it is not understood that these charters actually forbade courts of equity to be established in any, or that they absolutely prohibited an English chancery code distinct from the common law, or calculated generally to ameliorate the rigour of it to be introduced into their jurisprudence. But those who framed these charters, as well as those who received them, seem to have been in general not much disposed to establish such a code; but some in this respect to do more, some less, and some, as in New England and Pennsylvania, nothing, but only to vest in the law courts, with jealousy, and by little and little, powers in equity to soften the unyielding spirit of the law, as stated briefly in former chapters, especially those in which mortgages, conditions, penalties, forfeitures, and trusts, have been considered. It was quite at a late period that New York and New Jersey were in a condition to receive an English code of equity. Delaware was ever nearly in the situation of Pennsylvania. Louisiana never was in a condition to receive any part of it, until 1803. The king's grant of Carolina to the eight great proprietors included all the rest of Federal America, except Virginia and Maryland. These proprietors had general powers to establish courts and laws not repugnant to those of England. They early set out with a whimsical sort of feudal plan. In 1700, the white inhabitants south of Virginia were but 6000. This plan so abounded with palatines, land-graves, caziques, chancellors, admirals, chamberlains, and other great officers, as to exclude every thing called system in a new country, either legal or equitable.

On the whole, there was a court of chancery for a very short time in Rhode Island, but its arbitrary conduct soon caused its discontinuance. Attempts were made to establish such a court in Massachusetts, but failed. In New York the chancery powers were exercised in the executive branch (for a time) of the government, and according to Smith's History were always unpopular. In New Jersey much the same. In Pennsylvania and Delaware we find no such court. In Maryland and Virginia some chancery powers were exercised under the charters. In Maryland the lieutenant-governor was chancellor. In Virginia the chancery powers were in the hands of a court of chancery of three judges; and in the Carolinas and Georgia in the executive.

¶ 2. To obtain their objects in matters of equity the Colonies adopted different plans. For instance, Massachusetts, by

process at law in her courts of law, enabled, by special statutes, creditors to obtain their debts due to them from their absconding debtors, by attaching third persons who owed debts to such absconding debtors, somewhat like the foreign attachments in London, (see Ch. 192,) but Virginia obtained the same object by process in her chancery court grounded on special statutes.

Ch. 225.  
Art. 2.

Jefferson's  
Notes, 191  
&c.—6  
Cranch, 187.

§ 3. From this summary sketch it will be seen that even equity powers were but rarely placed in the hands of a single man in our Colonies. No powers in equity were specially provided for in the old confederation; nor do there by the acts of Congress appear to be any powers in equity vested in the district courts, held by a single judge, except to reduce a forfeiture annexed to a contract to what "is due according to equity." Sect. 26, Act of Congress, September 24, 1789. But the contrary appears in the 9th and 19th sections of said act. It will not be practicable in this work to consider equity cases in detail. Though those decided in our courts are yet but few, yet in fact, near all in the English code of equity are authorities here, as will be observed on examining them, and on noticing the vast numbers of them cited, and almost alone cited in our trials in equity.

As a society becomes rich, civilized, and commercial, equity becomes the more necessary to enforce a specific performance of contracts, but in some good measure on known and settled principles. The law proceeds *in rem*, only in land actions to recover them, and in detinue and replevin to award the thing itself in dispute to the plt.; in all other cases of torts and contracts it gives him damages only, often inadequate, for not having the thing itself contracted for. This consideration and the need there has often been to enforce a trustee specifically to perform, and the need there has often been to sift the truth out of the parties in the numerous cases of fraud and concealment, have all led to the extension of the powers in equity.

§ 4. *Constitution.* The constitution of the United States provides, that "the judicial power shall extend to all cases in law and equity," to all the Federal cases enumerated in it. Hence equity is as much made a constitutional part of our Federal judiciary system as law is, and all decisions in equity authorized by that constitution are as much a part of the supreme law of the land as decisions in law are. This is the broad and firm foundation on which an excellent code of equity may in time be established; and as it probably will be slowly formed, on account of the limited number of cases to which the Federal judiciary power is confined, it most probably will be the better matured and the more perfect in the end.

Art. 3, s. 2.

§ 5. *State constitutions.* These do not respect principles and

CH. 225.  
Art. 2.

cases in equity, strictly so considered, otherwise than they establish generally just and equitable principles of government; and several of them make provision expressly for courts of chancery and equity, such as usually existed before the American revolution, and all of them leave State legislatures at liberty to establish such courts. The constitutions of the New England States do not mention chancery courts or chancellors; that of New York merely recognises the chancellor as holding his office during good behaviour, or till sixty years of age, and excludes him mostly from other offices (and views him as an officer before the revolution) and empowers him to appoint the register and clerks in chancery, directs him to test proceedings in it, and makes him one of the court for the trial of impeachments and correction of errors. That of New Jersey (art. 8) makes the governor, chancellor, (implying too one existed previously.) That of Pennsylvania mentions none, but gives to the Supreme Court and Courts of Common Pleas, "besides the powers heretofore exercised by them," "the powers of a Court of Chancery, so far as relates to the perpetuating testimony, the obtaining of evidence from places not within the State, and the care of the persons and estates of those who are *non compotes mentis*. And the legislature shall vest in the said courts such other powers to grant relief in equity as shall be found necessary; and may from time to time enlarge or diminish those powers, or vest them in such other courts as they shall judge proper for the due administration of justice."—Was rather a new article in the constitution of 1790.

§ 6. The constitution of Delaware, adopted September 1776, provides, that "the justices of the Courts of Common Pleas and Orphan's Courts, shall have the power of holding inferior Courts of Chancery as heretofore" &c. What these were does not come within the compass of this work to inquire. That of Maryland provides, the chancellor (&c.) hold his commission during good behaviour, and for a register in chancery &c. So in Virginia the Court of Chancery existed and was one of the three superior courts, and consisted of three judges, who, and the five judges of the General Court and three of the Court of Admiralty, constituted the Supreme Court of Appeals (adopted July 5, 1776.) The constitution of North Carolina provides also, for judges of the supreme courts of law and equity. That of South Carolina provides, that "the judicial power shall be vested in such superior and inferior courts of law and equity as the legislature shall" establish. This was the second constitution of South Carolina, adopted after the Federal constitution was. That of Georgia makes no mention of chancery powers; nor does that of Vermont, except

Since altered.  
See  
courts.

it authorizes the legislature to erect a Court of Chancery, Ch. 225.  
 "with such powers as are usually exercised in that court, or Art. 3.  
 as shall appear for the interest of the Commonwealth, provided they do not constitute themselves judges of the said court." Constitution of Tennessee in this respect is like that of South Carolina. The same is that of Kentucky. And most of the State constitutions which have been formed since that of the United States was adopted, have adopted the principles of it in this respect, in which the variety in the several Colonies and States has been more considerable than in any other part of their system.

§ 7. It will be observed, the judicial power in the Federal constitution extends to cases in law and equity, and as will be seen in equity as in England, but for the 16th section in the judiciary act of September 24, 1789. It is a rule in the English system, for equity to decree a specific performance of contracts, though there is a remedy by action at common law, in many cases where the agreement was fairly made and not very unequal, and where unfairly obtained, or on terms very unequal, to set it aside. 1 Ch. Ca. 39, 42; 2 Vern. 423; 1 Ch. Ca. 42, *Parker v. Palmer*. Though otherwise, anciently. 1 Roll. Abr. 280; 1 Roll. R. 368; *Latch*, 72. It will in our practice be matter of much critical inquiry how far that section excludes all suits in equity where there is a remedy at law. As to a remedy at law and guaranty, see an important case, Ch. 50, s. 21, *Russell v. Clark*, as to guaranties &c.

1 Ch. R. 158,  
*Wiseman v.*  
*Roper.*

ART. 8. *Federal statutes in relation to equity.*

§ 1. There are several statutes of the United States granting powers in equity (among others) to the Federal courts; also prohibiting all suits in equity where there is a remedy at common law. These have already been considered generally, in Ch. 186, a. 10, where the constitution and statutes of the United States were considered and examined in relation to writs of prohibition and admiralty jurisdiction &c.; also, Ch. 187, where there are stated the constitutional powers and origination of the Federal courts;—also Ch. 187, a. 7, s. 1 to 26, where there are collected decisions as to the powers and duties of the Federal courts. See also, Ch. 187, a. 16, some cases of construction as to the powers of these courts;—also, a. 17, s. 1 to 22, general rules of the common law &c. as to the powers and duties of courts; and especially s. 19, 20, 21, rules in equity courts;—also art. 18, s. 1 to 14, maxims in law binding on all courts.

§ 2. Though the Federal statutes have been noticed in prior chapters, which generally vest in Federal courts powers in equity, yet some particular clauses remained to be noticed,

CH. 225. which give them powers in equity to do particular acts. See  
 Art. 3. writs of *ne exeat* and of *injunctions*, Ch. 186, a. 11, s. 11, 12, 13; and Act of Congress, Feb. 13, 1807.

Act of Congress, April 29, 1802, s. 26.

By this act "in all suits in equity it shall be in the discretion of the court, upon the request of either party, to order the testimony of the witnesses therein to be taken by depositions," according as taken in the highest court in the State in equity in like cases; but does not extend the rules to States in which testimony by deposition in chancery is not taken.

Act of Congress of Feb. 20, 1812, s. 3.

§ 3. This act provides, that "in any cause before a court of the United States, it shall be lawful for such court in its discretion to admit in evidence any deposition taken in *perpetuam rei memoriam*, which would be so admissible in a court of the State wherein such cause is pending according to the laws thereof."

Act of Congress, Sept. 24, 1789, s. 19.

§ 4. By this judicial act of Congress it is made "the duty of Circuit Courts in causes in equity, and of admiralty and maritime jurisdiction, to cause the facts on which they found their sentence or decree fully to appear upon the record, either from the pleadings and decree itself, or a state of the case agreed by the parties or their counsel, or if they disagree by a stating of the case by the court." It will be observed, that by this act only the Circuit (not the District) Court is required so to state facts on the record in cases in equity. It has been decided, as we shall see, that there is no jury trial in these cases; so no way to find and state the facts by special verdict. Then such a state of facts in the lower court becomes necessary, as the grounds of its decisions, to enable the court above to see these grounds if erroneous or not.

Act of Congress, Sept. 24, 1789, s. 26.

§ 5. This is the most important section in this important act, establishing the Federal judicial system, both as it respects causes in equity and causes in law.

It enacts, "that a final judgment or decree in any suit in the highest court of law or equity of a State in which a decision in the suit could be had,—where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or (2d) where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favour of such their validity; or (3d) where is drawn in question the construction of any clause of the constitution or of a treaty or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party, under such clause of the said constitution, treaty, statute, or commission,—may be re-examined

and reversed or affirmed in the Supreme Court of the United States, upon a writ of error, the citation being signed by the chief justice, or judge, or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States in the same manner and under the same regulations; and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a Circuit Court; and the proceedings upon the reversal shall also be the same, except that the Supreme Court instead of remanding the cause for a final decision as before provided, may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned question or validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute.

CH. 225.

Art. 3.



§ 6. Sect. 34 of the act enacts, "that the laws of the several States," (where no Federal law to decide by,) "shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." It will be observed, that the laws of the several States are not made rules of decision in cases in equity. The distinction was very properly made; as the several States had codes of law well known and complete to near all the purposes of *quædam* and *tuum* and to many other purposes; but no State had a code of equity of much value. On the 25th section, above, was grounded the writ of error in the great case of *Gelston & al. v. Hoyt*, stated Ch. 224, a. 10; the great case of *Martin v. Hunter, &c. &c.*

1 Wheat 304,  
392.

§ 7. It will be observed further, that though equity is very often mentioned in the many charters, constitutions, and statutes above cited or referred to, yet in none of them is it in any degree whatever defined, though the expression clearly must have had reference when used, to some code of equity in a system of jurisprudence, yet none is named, not even the State or nation in which to be found. Therefore, a foreigner may well ask, though Americans will understand to what system it referred. So well understood was the English code of equity and chancery proceedings in the United States, that we all well understood that was intended whenever the word equity or chancery was used in a general sense, as above. Therefore, in forming a constitution even in Vermont the people of that State in 1786, authorized their legislature to erect a Court of Chancery, "with such powers as are usually exer-

CH. 225. cised in that court," referring, as was well understood, to the  
 Art. 4. English Court of Chancery, though not named or even remotely alluded to. The words then, *equity and chancery*, being so understood in the constitutions and statutes cited in this chapter, our course is to find this code in English books we possess; very little affected till of late years by our own principles and cases in equity.

1 Cranch,  
 Rules of  
 Practice.

§ 8. These and other considerations no doubt induced the judges of our Supreme Court of the United States, in their 17th rule of their rules of practice, to make it conformable to that of the chancery in England.

*State statutes relating to equity &c.* These have been sufficiently noticed in two States (Massachusetts and Maine) already, in different parts of this work; and it is not within the intention of it to notice them in every State, except a very few of the most material parts of them, as occasions may occur; nor is there room in this work to trace chancery powers through the church and imperial government to the Roman *prætor* and Athenian Archon.

ART. 4. *A sketch of equity powers in England, as exercised in the modern courts of equity* distinct from the ancient Court of Chancery. There will be occasion further to notice these powers, especially in support of American cases in subsequent articles.

4 Inst. 78, 82.  
 —1 Rol. 384  
 —Hob. 63.—  
 1 Rol. 372.—  
 2 Inst. 552.—  
 2 H. VI 32.  
 —Eq. Abr.  
 127, 128, 129.  
 —37 H. VI.  
 14.—1 Mod.  
 305.—1 Stra.  
 149, 150, &c.  
 —See Ch. 114,  
 a. 27.—Pow.  
 on Con. 57,  
 58.—1 Ves.  
 jr. 545.—  
 Com. D.  
 Chan. 3 F 1,  
 4 W 1.—3 P.  
 W. 395.—  
 Bunb. 183,  
 395.—2 Com.  
 D. Chan. 3 F  
 1.—3 Bl.  
 Com. 46.—  
 See several  
 cases Coop-  
 er's Plead-  
 ings in Equi-  
 ty.

§ 1. On these constitutional and statute provisions above, it has been asked, what code of equity the Federal constitution means, when it extends the judicial power to enumerated cases in law and equity. It has been and will be clearly shewn the English code of equity was intended. It also has been asked, how are we to understand this code. In our best reports the words, *chancery and equity*, seem to be confounded. We must inspect the English system to find what is meant by equity. In that we find an ancient Court of Chancery that existed long before the conquest, "governed by the rules of the common law," and not by the rules of the civil law,—and necessarily, as no code of civil law existed in England until long after the conquest. We find also, in the English system a "court of equity," nearly coeval with uses and trusts, the first decree in which was 17 R. II. 2. In chancery are two courts, the *ordinary* in which the chancellor proceeds by the common law; 4 Inst. 79, 80, 81; in this, misleading *in form* is not prejudicial. 1 Rol. 372. 2d. Extraordinary jurisdiction,—court of equity; this is not a court of record; 4 Inst. 84; Yelv. 227; and proceeds by English bill, and has jurisdiction properly in three cases: 1. Fraud: 2. Accident: 3. Trust and confidence. In this court the plt. cannot proceed if he has a remedy at law; so held, on demurrer to

his bill. But equity will sustain his bill, where difficult for him to proceed at law. It sustains a bill for a preacher's pension only, relieves an heir against fraud. 2 Atk. 39. So if imposed on by exorbitant prices, in several cases, by one. Id. and 301. Sustains a bill for shares in water-works. 3 Atk. 336. So for B to recover back money he paid for his own estate to A, though no fraud. 1 Vesey, 126. So for the plt. if his deed be destroyed or concealed by the deft. 387. So if lost and the plt. cannot recover at law. Id. So if his title at law is doubtful; 1 Vesey jun. 424; but not for volunteers. 1 Vesey jun. 275. So equity relieves, if an action be against good conscience, though fraud is denied. 1 Vern. 489. Will direct a reconveyance of an absconding debtor's estate for his creditor's benefit, if a trustee buy it at an undervalue, on repaying to him principal and interest. 1 Vern. 465. Equity does not relieve against one's bond merely because a weak man. 3 P. W. 129. A owns an estate, and his attorney sells it to B, and does not disclose to him an incumbrance, the attorney in equity must make satisfaction. 1 Vesey, 95. So if a minor's administrator sell as his own estate the minor's funded stock &c. to A, and he from the entries in the books had notice it was the minor's, he is relieved in equity against A. Ch. R. 298. After the probate of a will equity will inquire into the fairness of a residuary devise of real estate in it. Stra. 666. Equity construes a statute precisely as a law court does, 3 Bl. Com. 430; that "according to the true intent of the legislature." Id. Where it is known, but where not exactly expressed or defined, equity allows the decision to be as in the judgment of a good man it ought to be. Id. Equity allows an estate by curtesy in a trust estate, but not dower. So it can allow a mortgage at five per cent. to be reduced to four if interest be well paid; but not one at four to be increased to five if not so paid. And 2 Vern. 289, 316; 3 Atk. 520. So equity can enforce the specific performance of contracts, and assist defective conveyances not against clear law. It can notice all frauds, covins, and deceits, not remediable by law: 2. All accidents, as if one be robbed going to pay money: 3. Breaches of trust and confidence; 4 Inst. 84; 10 Mod. 1; but can never suffer its own principles or rules to be used for the evasion of good laws. Equity can exclusively notice trusts or second uses. 10 Mod. 103. If issue be joined can award a venire returnable into B. R. 10 Mod. 259. So it can aid defective executions of powers. 10 Mod. 467. So it can set up a will cancelled upon a false supposition. Id. So on a covenant to sell and convey, it can compel the heir to join in the conveyance. 10 Mod. 469. But not the heirs in tail. Id. Exceptions. Id. A contracts to sell lands to B, A sells to C

Ch. 225.

Art. 4.

3 Bl. Com.  
429, 436.4 Ves. jr.  
678.— 2 Bac.  
Abr. Ch. C. 2.10 Mod.  
Cooper's Pl.  
Introd. 26,  
27.



CH. 225. with notice, C is trustee to B; and equity can enforce C to convey to B. 10 Mod. 528. So if one devise his lands to pay his debts, equity can decree after purchased lands to be sold therefor, p. 529, if contracted for before the devise; 2 Ch. Ca. 144; and even if not. 10 Mod. 529.

Art. 4.

Fearne's Devises by Pow. 43, 46, 47, Foley v. Burnell & al. cited. 1 Brown's Ch. Ca. 274.

Roberts on Frauds, 155 &c.

Powell on Dev. 696.

Powell on Con. 291, 292, &c. 295, 312.

Ib. 315, 316, 317, 318.

Ib. 325.

§ 2. If the property be in trustees, equity may compel them to assert their legal property on the application of *cestui que trust*, however remotely interested. So equity has cognizance of the division of chattels personal, between tenants for life and those to whom limited over as *res in specie*, and to oblige tenant for life to preserve the same accordingly.

§ 3. If the plt. state the very agreement in his bill, and the deft. admits it, submitting to perform or not, equity can compel him to perform, if he do not insist on the benefit of the statute of frauds. See pleadings, 4 Vesey jun. 23, 91, 720.

§ 4. If a devise be made to A on a confidence that binds his conscience, his breach of confidence equity views as fraudulent. This is a ground of equity, and it decrees A to hold for the benefit of the party aggrieved. Hob. 109. So equity will set a will aside obtained by fraud, good at law in a special case. 1 P. W. 288; 2 Vern. 699. So if A get a legal will to himself in fraud of others, equity can decree him their trustee. Id. So if the heir prevents a provision in a will for younger children, it will decree him to make it. Pre. Ch. 4; Gilb. R. Eq. 11; 2 Ves. 564; Cooper's Pl.

§ 5. A court of equity can enforce a specific execution of a parol agreement as to land, where there is no danger of perjury or fraud, as if admitted by the deft's. answer, or is partly performed, &c. See Ch. 11, several cases, especially art. 6, a. 9, a. 10, a. 11; Ch. 32, especially a. 10, a. 12, contracts enforced, set aside, &c. If a surety in a bond pay it, equity will compel the principal to pay him the amount. 2 Vesey, 371, 374; 2 P. W. 243. A bond void at law equity will establish to effect the parties' intentions. 2 Atk. 97. So the assignment of a bond, with or without consideration. 2 P. W. 608; 2 Vern. 540. When certain instruments appear which clearly imply another, equity intends it, though not produced. 7 Brown's Par. Ca. 21; 1 Vesey, 534. Will decree any contract that ought in conscience to be performed. 2 Pow. on Con. 10. Will decree a general account for fraud. 5 Vesey jun. 27. Will order a minor trustee to convey an estate in Calcutta on 7 Anne, c. 19, 240, 248. Will act in the case of a lost bond, though law does also. 240. So in contribution among partners. 79. Will decree an unreasonable contract to be set aside. 1 Eq. Ca. Abr. 68;—cases 88 to 92. Concurrent authority in law and equity as to frauds &c. 1 Burr. 396.

§ 6. *Cases in which equity cannot exercise power, or will not.* Not in case of a penalty agreed as special damages;—not of a rent of £5 an acre for ploughing up ancient meadow. Nor can equity relieve against a lapse of time material in the contract, nor in cases of covenant for renewal of leases. Nor can equity relieve against positive settled law, though even very hard, as the law in England &c. which exempts lands descending or devised, from being applied to pay simple contract debts of the ancestor or deviser, though arising from the monies lent to buy the very land;—nor against laws of descent, though founded in severe feudal principles. So in other cases in which equity must obey the law, and say, *ita lex scripta est*. Nor against a maxim of law, except in cases of fraud; 1 Roll. 374;—nor against a statute understood;—nor in any way in effect to evade it;—nor against a judgment duly obtained; Ch. Ca. 227;—nor one executor, where the other receives and releases the whole debt;—not against a contract honestly obtained. Nor can equity set up a deed or will not duly executed; 3 Atk. 203, 453; Mod. 620; 2 Vern. 475;—nor a right legally barred, 2 Atk. 240. Nor can equity act if the plt. have as good a remedy at law. 1 Vern. 71. *Secus*, if the legal remedy be doubtful or embarrassed; Brown, 27, 200; 2 Vesey, 100; Stra. 403. So otherwise, if the direction in equity be against law in a mere matter of form only. 1 Vern. 439; 1 P. W. 682. Nor can equity support an equitable against a legal and equitable title, though this be lost. Stra. 240. Nor can equity relieve one who submits to be examined as to a matter penal upon him; Stra. 168 &c.;—nor a deft. who pleads an improper plea by his attorney; 2 Vern. 325. Nor can equity deny to one his legal right to try his title as often as he pleases in ejectment, 10 Mod. 1;—nor relieve an obligor from the penalty of a bond, till he pays the honest debt and costs; 2. Nor can equity alter the maxims of law; or relieve against a collateral warranty, though “the harshest and most cruel point of the common law.” p. 3;—and several cases, Cooper’s Pl.

CH. 225.  
Art. 4.

Cooper’s Pl.  
Introd 28.—  
3 Bl. Com.  
480, 436.

2 Com. D.  
Equity in  
Chancery.

§ 7. A court of equity will not set a will aside on a suggestion of fraud or imposition in making it; as if so, it is not his will, and a matter of fact at law; 1 P. W. 548; 2 Vesey, 183; as the will of a weak man; but will his deed got by misrepresentation, 2 P. W. 270;—will direct an issue as to such will, 2 Atk. 324, 424. Nor will equity inquire if the testator was *non compos*;—is matter at law. 1 P. W. 288; 2 Atk. 424; 3 Atk. 17. Such fraud is at law. 1 Eq. Ca. Abr. 406; 2 do. 421; 3 Brown’s Par. Ca. 358. So if *compos*, or not, is a fact at law. 3 Atk. 544. Is not his will by law. Will not direct an issue to try the testator’s sanity, where the

Powell on  
Dev. 191 to  
721; and  
many cases  
cited.

**Ch. 225.** subscribing witnesses attest him sane, on the heir's mere suggestion of insanity, and no proof. 3 Atk. 356. Chancery does not declare a will well proved against the heir where not forthcoming, or to be found. 2 Atk. 120. Will not decree a will well proved unless all the witnesses are examined; 3 Atk. 27; 1 Wils. 216; 1 Vesey, 177; or the heir actually admits it. 1 Vesey, 274; 2 Stra. 961; 1 Atk. 627.

**Powell on  
Con. 1 Vol.  
104, 106.**

**Ib. 161, 171.**

**Ib. 186.**

**2 Pow. on  
Con. 11, 16.**

§ 8. A court of equity will not decree a *feme covert* to pay a sum of money; but if she engage, generally will order, where reasonable, her trustees to pay out of her personal estate and rents &c. 1 Brown's Ch. Ca. 16; Ch. 19, a. 10, s. 7. Not decree a specific execution of a contract by A to convey B's estate;—nor relieve against a penalty in the nature of agreed damages;—nor support a contract to pay one for acting as puffer at auctions, being to deceive fair purchasers;—is also void at law.

§ 9. A court of equity will not decree alimony to a second wife, living the first, but will an agreement for a separate maintenance in the nature of it; but usually will not decree a specific performance of an agreement not entitling the party to damages at law. Pre. Ch. 96. It is at the discretion of a court of equity not to enforce a specific performance of contracts, even though there be no remedy at law;—will not when the parties appear to rely on an action at law;—nor decree security to a party he did not provide for. Moseley, 118; 1 P. W. 107, 461. It is enough the party has the security he at first agrees to take, Id. Will not set aside an agreement merely for the inadequacy of price. 2 Pow. on Con. 151. Will not enforce a contract entered into under the impulse of fear, occasioned by unlawful violence; but set it aside. 2 Pow. on Con. 160, 163. But not for a just awe of a third person, a lawful superior, and exercising his authority for a lawful purpose. 1 Vesey, 19; 1 Atk. 11. Never if fairly and freely confirmed. 2 Vesey, 152; 1 P. W. 293, 727. Will not allow a party to recover a penalty, if without it the substance of the contract can be obtained. 2 Pow. on Con. 204; 1 Vern. 60; 2 Vern. 3.6; 3 Atk. 520; Ch. 28, a. 5; 1 Vern. 68; 1 Vern. 220, 268. Cannot decree the specific performance of a contract as to personal estate, if it be denied, and the relief demurred to. 2 Pow. on Con. 216. *Secus*, if not demurred to;—the debt. answers. Id.; Ch. R. 158. Court of equity will not apportion relief where a contract is entire, and in part inequitable. 2 Pow. on Con. 226, 227; 2 Ch. Ca. 202. Nor enforce one exorbitant, and made with a weak person, though in part executed. Id. Nor make a decree which cannot be executed, or will be useless. 1 P. W. 130, 470. Will not decree an agreement attended

with hard circumstances; Eq. Ca. Abr. 18, pl. 9;—nor if fraudulent, pl. 10;—not if uncertain, pl. 11;—nor if suspicious, though no fraud proved, pl. 12. Will not set aside a settled account, but on strong ground. 5 Vesey jun. 837. Nor enforce an agreement proved by letters different from that stated in the bill, and proved by one witness; 5 Vesey jun. 452, —nor where minors &c. are to perform, 846;—nor sustain a bill to set aside a bond void at law. 5 Ves. 286. Will not aid a forfeiture, or suffer a penalty to be demanded.

§ 10. *Cases in which law and equity courts have concurrent powers.* Every kind of fraud is cognizable equally in a court of law, as in a court of equity. Some frauds in the former only; as in obtaining a devise of land. "Many accidents also supplied in a court of law;" as loss of deeds, mistakes in accounts and receipts, wrong payments, deaths, which make it impossible to perform a condition literally, and many other contingencies. And in many cases there is no relief in either against accidents; as if by accident a recovery be ill suffered, a devise ill executed, a contingent remainder destroyed, or a power of leasing omitted in a family settlement. If a technical trust in a deed created by the limitation of a second use be confined to equity, other trusts exist cognizable at law; as deposits, and all manner of bailments; and case for money had and received to the plt's. use, a remedy at law, almost as universal as a bill of equity. Neither court can vary men's wills or agreements, or make wills or agreements for them; both are bound by the intention of the parties. On the whole, their main difference is "in the *mode of proof*, the *mode of trial*, and the *mode of relief*."

§ 11. Where the main question is as to title, so at law, yet an equitable circumstance may give equity concurrent jurisdiction, then it must decide the legal question. 3 P. W. 296.

ART. 5. *General principles or rules in equity as to performing contracts &c.*

§ 1. A court of equity will not sustain the suit or process, except only where the plt. wants the thing in specie, and cannot have it but by chancery proceedings. And 2 Bro. Ch. R. 343; 8 Vesey jun. 163, 363; Mitford's Plead. 109; 1 B. Wheat. 197; 1 Hen. & M. 110 to 133, Long v. Colston.

§ 2. The equity jurisdiction to decree specific performance is discretionary and not compulsory, for the judge in equity may in every case, if he sees fit, leave the contractee to avail himself of the legal advantage of his contract. Codman v. Horner.

§ 3. Wherever the matter of a bill is in damages, the remedy is not in equity but at law, because the damages cannot be ascertained by the chancellor's conscience, but only by a

3 Bl Com.  
431, 436.—  
Cooper's Pl.  
Introd. 27,  
28; several  
cases more.  
Cooper's Pl.  
116 &c.

Powell on  
Dev. 699.

Errington v.  
Aynsley.  
1 Bac Abr.  
Agreements  
B.

1 Vesey jr.  
565.—2 Ves.  
679.—2 P  
W. 198.—18  
Ves. Jun. 10.  
—7 Ves. Jun.  
35.

12 Ves. jr.  
331.

CH. 225. jury or some statute provision. But see *Morgan v. Morgan*,  
Art. 5. a. 10, s. 2.

5 Vesey jr.  
846.—10 Ves.  
jun. 292.—  
3 Atk. 188,  
384.

§ 4. It is not a rule in all cases binding on courts of equity, to order contracts not specifically performable to be delivered up; but in many cases to leave the party to proceed at law, and to claim on his contract the right he has acquired, and usually where the damages to be recovered are equal to the injury. 2 Bro. C. C. 341.

2 Eq. Ca.  
Abr. 161,  
Dorison v.  
Westbrook.—  
2 Vern. 127.  
—5 Vin. 540.

§ 5. Therefore, a court of equity will not entertain a bill for a specific performance of a contract of stock, corn, hops, or other articles of merchandize, but will leave the plt. to sue in the courts of law, except in special cases. 2 Vern. 394; Cooper's Pl. 132, 133; Sugden, 154.

3 Wooddes.  
464. Whistler  
v. Main-  
waring.—  
3 Ves. 184.

§ 6. So if there be a breach of common covenants to repair the leased premises, the proper remedy says the court of equity is an action at law. So is viewed the lessee's covenant to fill up a ditch or a gravel pit. 8 Vesey jun. 159. Flint v. Brandon; 6 Vesey, 818; but 3 Atk. 512; 8 Ed IV. 4; 1 Vesey jun. 236.

10 Ves. jr.  
161, Nut-  
brown v.  
Thornton.  
Lester v.  
Baxter.—  
Denton v.  
Stuart.

§ 7. Exceptions to these rules. As where there is a penalty in the contract to be relieved against, or where the damages recoverable at law on contracts respecting mere personal chattels, are an inadequate compensation for the non-performance of the contract. 3 Atk. 383; 2 Vern. 394, Gardner v. Pullen; 2 Br. P. C. 415, Thompson v. Harcourt; 3 Br. Ch. R. 166, Lucas v. Commerford; 8 Vesey jun. 164; 7 Vesey jun. 34; Bunb. 135; Fontb. Notes on Equity Tr. 389; 12 Vesey jun. 395; 1 Br. Par. Ca. 133; 10 Vesey, 161; 1 Cox, 258; 17 Ves. jun. 276.

Eq. Ca. Abr.  
18, pl. 8.—  
2 P. W. 243.  
—2 Vern.  
480.—Cove-  
nants to con-  
vey &c. See  
Ch. 104, a. 2,  
s. 1 to 40.  
4 Ves jr. 480.  
—11 Ves. jr.  
591.—8 Ves.  
jr. 505.—10  
Ves. jr. 292.  
—6 Ves. jr.  
273.

§ 8. For equity to decree a specific performance of contracts, they must be valid at law. But some exceptions; as if one be bound by bond to settle certain lands by a day named and dies before the day, so the bond is saved at law, yet a court of equity will decree a specific performance.

§ 9. Equity requires a contract or agreement, in order to be specifically performed, to be certain and defined, fair and equal, and proved in a legal manner; also to be a final agreement, not merely articles for the purpose of forming a final agreement on the subject: also, requires the adequacy of price to be such as not to leave room to suspect fraud or oppression, or undue advantage from the inadequacy of price. Where heirs not named are bound to convey. New. on Con. 34.

3 Bos. & P.  
162, Johnson  
v. Johnson.

§ 10. How equity enforces a contract in part. Generally a court of law views the contract as entire; hence to be performed *in toto* or not at all. But a court of equity often enforces a part only, and views another part as void. As where A sold two lots of land to B distinctly valued, and B

was evicted from one of them after he paid for them, and before the title was executed; even a court of law allowed him to sever the contract and recover back the money paid for that lot, and retain the other; but a court of law can but rarely do this; and probably in this case the two lots being distinctly valued, the court considered there was in substance two contracts.

CH. 225.  
Art. 5.

§ 11. But in the sale of several lots, and the seller cannot make title to some of them, a court of equity compels the buyer to take those to which a good title can be made, if separate from the others, and without being lessened in value, and to take a compensation for the others. Here equity severed an entire contract,—this a court of law cannot do. Many cases in minute detail in which equity enforces, or not, specific performances of agreements. Sugden, 155 to 164, 200 &c.

2 Br. Ch. R. 118, Poole v. Shergold.—  
1 Esp. R. 150, Chambers v. Griffith.—1 Cox, 273.—11 Ves. jr. 467, M'Queen v. Farquhar.—6 Ves. jr. 678.—5 Bin. 355. 3 Yeates, 6.—3 Cranch, 270, M'Ferran v. Taylor & al.

§ 12. So in equity, if the seller cannot make title to a small part of an entire estate, not material to the enjoyment of the rest, the purchaser will be compensated for this part, and be compelled to take the remainder and pay the part of the price appertaining to it. 5 Vesey jun. 818.

§ 13. So a court of equity adopts the same rule, if there be a small variation in the description given of the estate by the seller. It compensates the buyer for this, and compels him to take the estate when he can have substantially what is agreed for. But if the description given by the seller is not true in a material part, even a court of equity will compel him to make good that description, though the variance be occasioned by mistake. See art. 10, where a jury's finding is void.

But a Circuit Court has no power or jurisdiction in a cause to set aside a decree in equity after the term in which made. But a court of equity has power perpetually to enjoin a judgment at law.

3 Wheat. R. 591.—4 Cranch, 137.

§ 14. All courts refuse to enforce contracts made to evade or to violate a law of our country. As if a ship of an alien be registered in the name of a citizen for the alien's benefit, to enable him to carry on a trade the law denies him, he cannot recover the property, nor can the citizen in whose name the ship is registered; nor will they enforce it if the parties were enemies when they made it, and its object was a fair stratagem of war to secure property from capture by that country, and though the law has ceased to exist by the war's ending. 1 Hen. & Mun. 33, 70; 1 Wash. 164.

4 Dallas, 308, Duncanson v. M'Clure.—4 Dall. 342, Murgatroyd v. M'Clure.—3 Cranch, 242, 249, Hannay v. Eve.

Equity does not expect a *mathematical*, but only a moral certainty in specific performances, as to title or quantity; as where the sovereign in his grants of lands reserved a part of

2 Atk. 20, Lyddal v. Weston, 1 John. Ch. R. 357.

CH. 225. certain mines in it, as in America, this does not prevent such performance.

Art. 6.

6 Ves. jr. 12.  
—Cooper's  
Pl. 171 to  
178.—9 Ves.  
294.—14 Ves.  
273.

1 Wheat. R.  
161, Barr &  
al. v. Lapsley  
& al.

1 Wheat. R.  
179, Hep-  
burn & al. v.  
Dunlop & al.

9 Johns. R.  
450, Waters  
v. Travis —  
1 Ves. jun.  
316.—8  
Johns. R. 566.  
—5 Bin. 356.

16 Ves. jun. 1,  
Millegan v.  
Cook.—13  
Ves. 77.

4 Cranoh,  
137.

§ 15. The principle is general, if not universal, that no court can enforce a contract made to violate or to evade the law that court sets to administer, even if made by persons not subject to such law, whether statute or common law; nor if the contract be produced by means forbidden by the general policy of the law: as a deed of gift from a client to his attorney, or a conveyance by a ward just of age to his guardian, &c.

§ 15. Suit in equity in Columbia. Bill to enforce an alleged contract to take cotton bagging in payment of a debt; bill dismissed because the evidence did not prove the debt. made such a contract. And had the contract been completed would there not have been a remedy at law? See 10 Vesey jun. 161; 3 Atk. 383; 2 Vern. 394; 1 P. W. 570.

§ 17. Suit in chancery. One point decided was, that a court of equity will decree a specific performance of a contract to convey lands, if the contractor can make a valid title at the time of the decree; but if dismissed in such a case the dismissal is a bar to a new bill for the same purpose. But this inability to make a title does not authorize the court to rescind the contract to convey when there is a legal remedy for a breach of it; nor is the contractee's alienage a reason for rescinding it, though it may be for refusing a specific performance.

§ 18. Though the contractee is not held to take a defective title, but if the contractor make misrepresentations or mistakes as to the quantity or quality of the thing contracted for, the contractee may elect to have the deficiency deducted from the price, and to have a specific performance of the residue; and one may be compelled to convey a part who has disabled himself to convey the whole.

§ 19. If the contractor file a bill for specific performance and is unable to make title to a material part, equity does not compel the contractee to perform *pro tanto*. But if the contractee so file his bill, he may elect to take the part to which he can have a title, and a money compensation for the rest.

§ 20. A court of equity has discretionary power to carry into effect or not a judgment of a court of law, according to the circumstances of the case. But a judgment creditor must sue out execution before he comes into equity. Cooper's Pl. 149.

§ 21. Equity will not decree a specific performance of an agreement as to lands, in favour of aliens incapable of holding estates to their own use. *Simmons v. Hill*, 4 Har. & M'Hen. 258.

ART. 6. *Federal jurisdiction in equity.* This has already

appeared to a considerable extent in the constitutions and Federal statutes cited above; also in several cases cited in prior chapters as well as in this. Plea to jurisdiction must shew another. 1 Vesey jun. 372. Same is in bar. Id. CH. 225. Art. 6.

§ 1. *Its foundation, fraud, trust, or contract*; that is, the very intention in establishing a court of equity or chancery, is to constitute a court well organised to detect and unravel frauds, to enforce the execution of trusts, and to enforce the specific performance of contracts, and to provide equitable remedies in cases of accidents.

§ 2. A prior equity in A is a good ground of a suit in equity against B, who has a prior title by patent or deed to the same land. As where Watts, a citizen of Virginia, sued Massie, a citizen of Kentucky, in equity in the Circuit Court, to compel him to convey to Watts 1000 acres of land in the State of Ohio, Massie having obtained the legal title with notice of Watts' equitable title, acquired by making the first legal entry under the law of Virginia. The charge proved was Massie's getting the legal title by fraud. Decree in the Circuit Court against him, and that he convey &c. : appeal &c. One objection was, that the Circuit Court in Kentucky had no jurisdiction as to this land in Ohio State. But the Supreme Court held, 1. So was the case, if the title were in question, but as in this case, where the deft. is liable to the plt. on "contract, or as trustee, or as holding a legal title got by any species of *mala fides* practised on the plt.," equity gives a court jurisdiction where the deft. is found; and if a question of title may be involved in the inquiry, and be the essential point in the case, this does not oust such jurisdiction; cites Penn v. Lord Baltimore, in which case the chancellor of England decreed a specific performance of a contract respecting lands in America: 2. Held, there can be no jury to ascertain the facts in chancery causes: 3. How an entry in the land office ought to be supported, and the square plat preserved: 4. If an agent locate for himself lands he ought to locate for his principal, he is in equity the principal's trustee. Decree affirmed that Massie convey to Watts the 1000 acres &c., and thereon Watts to assign to him his right in another 1000 acres of &c. The warrant issued to O'Neal, whose assignee Watts was of the 1000 acres he claimed. Watts' bill was dismissed as to another deft. with costs to him, he being improperly joined. Surveys of the lands and the manner thereof were also ordered.

Other principles were adopted in this suit, as 5. A court of equity acts in *personam* usually, and not in *rem*, hence it acts where the deft. is found, and finally compels him to perform by attachments of contempt. 6. As Watts employed Massie

6 Cranch, 148, Massie v. Watts. This case revised and confirmed. 6 Wheat. 560, Kerr & al. v. Watts.

Penn's case. 3 Ves. jr. 170.



CH. 225.

Art. 6.



to locate Watts' said lot, there was an implied promise made by Massie to act faithfully, and when he took the lot to himself, he violated his promise; was guilty of fraud and a breach of trust, all the grounds of a suit in equity. 7. As to boundaries between provinces in British America, the original jurisdiction was exclusively in the king and council. 8. As to lands lying out of the jurisdiction of the court, cited as law in addition to Penn's case above, *Arglasse v. Muschamp*, 1 Vern. 75, in which the Court of Chancery in England, where the deft. resided, set aside a rent charge fraudulently obtained on land in Ireland: also, in *Archer v. Preston*, enforced a contract as to land in Ireland, though the deft lived there and was only on a casual visit in England. So 1 Vern. 419, held, if the trustee live in England, the chancellor may enforce the trust though the land lie in Ireland. So in *Toller v. Carteret*, 2 Vern. 494, a bill in chancery in England was sustained to foreclose "a mortgage of lands lying out of the jurisdiction of the court," the mortgagor being within it. 9. The court said, the inquiry is, "whether this be an unmixed question of title, or a case of fraud, trust, or contract," and held, the latter; so of chancery cognisance as above. 10. There was one material question in this case not started. Had not Watts a plain, adequate remedy at law? Clearly there is no other in Massachusetts or Pennsylvania, where such a case exists, or in any State where there is no chancery court. If a remedy at law, clear and adequate, then the 16th section of the judiciary act of Congress of Sept. 24, 1789, expressly forbids a suit in equity,—a. 3, deserves much attention;—for certain it is, that in numerous cases decided in English chancery, and sustained in it, there are also plain, adequate remedies at common law; for instance, for most of the cases decreed in that chancery are found such remedies in Massachusetts and other States having no chancery courts. But is this section strictly constitutional. Clear it is the Federal Constitution vests in the Federal courts powers in equity, as extensively as powers in law, and by the very same general expression, an expression which absolutely vests in these courts "*the judicial powers*" "*in law and equity*," in all the enumerated cases. It has been already shewn that this word *equity* unquestionably refers to the English code of equity, or the *powers in equity*, as exercised in England, no way limited or controlled by any constitutional or legal provisions in the United States, when the Federal Constitution was adopted. Suppose then that one half of these powers in equity were then exercised in England, in cases in which plain and adequate remedies existed at common law; then clearly by our constitution this came to be the case here, there being here no such constitutional or legal

Points examined.

CH. 225.

Art. 6.

provisions then to the contrary. Now if Congress can take away this half by a statute, why not all, and say the Federal Court shall not exercise any powers in equity, either at once, or by taking away a portion at a time? and if take away these powers in equity vested by the constitution, why not the powers in law vested by it? The absolute language of it is precisely the same in both cases. And if we read the only clause in this constitution which gives Congress any discretionary power to affect the judicial power vested by the constitution in the Federal judiciary,—a department in our system as independent as the legislature, and co-ordinate with it,—we find that clause equally respects the powers in law and the powers in equity. After enumerating the cases to which the constitution extends the Federal judicial power, in law and equity, we find this clause referred to, namely: “In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.” What exceptions, what regulations were here intended? Such as destroyed, or materially diminish this judicial power in this third independent co-ordinate branch of our government? Clearly not. Such a construction would make this branch exist at the will and pleasure of the legislature, and wholly dependent;—a construction no one can contend for. So farther, these exceptions and regulations, in fact, have no reference whatever to the original jurisdiction of either Federal court in law or equity; but only to the appellate jurisdiction vested in the Supreme Court in the said appellate cases; and that is, as seen in acts of Congress, merely as to the manner of appeals, and the sum or matter in question, as to which an appeal to the Supreme Court shall be allowed. These few hints may be useful to excite inquiry. This section, though short, is most material; for if constitutional, it may be brought in objection to a very large proportion of the suits usually brought in courts of equity. There have been thousands of actions in Massachusetts &c. sustained at common law, in which the material point has been fraud or breach of trust, and this remedy has ever been deemed plain and adequate; hence a court of equity has never been here allowed. If this section is in full force, how are such cases to be sustained in a court of equity?

§ 3. But the rule is laid down too broad, which states “this equitable jurisdiction extends to all cases where either the *res* in dispute, or the party, is within the jurisdiction of the court,” if meant the territorial jurisdiction; for in this view every acre

**CH. 225.** of land in England, every *res* and every party is within the jurisdiction of chancery. It proceeds in *rem* only when it alone has power to transfer the thing itself and ought to do it. For whenever the law will give or transfer the thing itself, in dispute, to the party entitled to it, his remedy is at law, especially if the said 16th section of our judicial act is in full force. So wherever the law gives a plain, adequate remedy. But the rule above stated must be taken with exceptions to it, one of which is that, "a specific performance will not be decreed of an agreement, whereupon damages could not be recovered at law," unless the remedy at law fail, on account of a mere informality in the contract. The above broad rule is limited by another rule, which declares that equity will not decree a specific performance, if the parties have an adequate legal remedy.

**Art. 6.**  
1 Vesey jr.  
565, Cooper  
v. Denne &  
al — Bro. C.  
C. 80.

4 Vesey jr.  
97—100,  
Cruse v.  
Pickon.

6 Vesey jr.  
186, Rose v.  
Calland. —  
See Wallin-  
ger v. Hilbert,  
1 Mer. 104.—  
See Stewart  
v. Allison, 1  
Mer. 26.

§ 4. So in the case in Vesey jun. it was held, it was in the court's discretion to decree a specific performance of an agreement for a purchase, or to leave it at law, and not compel one to take a doubtful title; 1 Bro. C. C. 75; and as it is a case in which damages may be recovered at law.

§ 5. So if A convey lands to B, C, and D, as trustees to sell them. and the receipt of the three to be a discharge to the purchaser for the purchase money, B dies and C conveys to D to get rid of the trust; D agrees with E to sell to him; C refuses to join in the receipt; D files his bill against E. to have him decreed to a specific performance, to take a conveyance, and pay, &c. The court refused such performance, as E could not be discharged of the purchase money; otherwise if C had only renounced.

§ 6. So in this case a bill was filed to compel the deft. to take a conveyance of an estate and pay &c. He agreed to purchase for £5000, understood to be free of tithes. Bill dismissed because doubtful if not subject to them, and the court said it could not make him buy a lawsuit. To this point, see Nagle v. Edwards, 3 Anstr. 702; Lord Peter v. Blancoe, 945; Scott v. Airey, in Nagle v. Edwards, and 1 Vesey jun. 210, 221; Conolly v. Parsons, 3 Vesey jun. 625, Pope v. Simpson, 5 Vesey jun. 145; Howland v. Norris, 1 Cox, 59, 17 Vesey jun. 280.

§ 7. If, however, there be a clear ground of equity, a specific performance is decreed, though the agreement be void at law. 3 P. W. 187, 1 Vesey. 256, as a. 5, s. 8, &c.

§ 8. As fraud vitiates a contract, in equity, as it does in law, equity never enforces a fraudulent one specifically. 10 Vesey jun. 492; 3 Atk. 383.

5 Vesey jr.  
818.

§ 9. Equity in compelling specific performance will disregard time if not of the essence of the contract. 5 Cran. 262; 7 Vesey jun. 273; but see 5 Vesey jun. 736, where material.

§ 10. A bill for specific performance of an agreement to purchase a bankrupt's reversionary interest from his assignees, defts. dismissed for the laches and trifling conduct of the plt. Plt. delayed four years to take a deed, frequently offered to him, and to complete his purchase;—much delay after he filed his bill. See 1 Bro. C. C. 156, *Mortimer v. Capper*; *Newman v. Rogers*, 4 Bro. C. C. 391; 3 Bro. C. C. 605; 2 Eq. Ca. Abr. 685; *Wyvill's case*, 1 Price, 292; 2 Vern. 186; 10 Mod. 503. CH. 225.  
Art. 6.

§ 11. But where the plt. agreed to purchase bankrupt's estate, held, he must take such title as the bankrupt had, and cannot insist on a title strictly free from all objections, as in other cases. In such a case the plt. objecting to the title, but insisting on his purchase, his bill for a specific performance was dismissed with costs;—not to be expected the assignees engage for more than the title of the bankrupt. *Green v. Wood*, 2 Vern. 632; *Maine v. Melbourn*, 4 Ves. jun. 720, 724; *Omerod v. Hardman*. 4 Vesey jr.  
667, *Spurrier v. Hancock*.—  
5 Vesey jr.  
818.—3 Bro.  
C. C. 605.  
  
5 Vesey jr.  
145, *Pope v. Simpson*.—  
*Coward v. Odingsale*.  
2 Eq. Ca.  
Abr. 688. pl.  
5.—5 Ves. jr.  
722, 737.

§ 12. Every contract in equity to perform is viewed as performed from the time it was made, where no other time is appointed for its execution. 7 Vesey jun. 294.

§ 13. Hence land agreed to be sold is in equity viewed as sold in fact, and as the vendee's property, and is devised and descends accordingly. 3 P. W. 215. The same as to money agreed to be vested in lands, it is considered in equity as lands.

So our Supreme Court of the United States, sitting in equity, holds, that if A, by his will or deed, directs land to be sold and turned into money, equity views it as money. So if he directs money to be vested in lands, equity view this money as land, and an alien can take the money. 3 Wheaton's  
R. 563, *Craig v. Leslie*.

§ 14. *Where a court of equity has jurisdiction as to a bond and articles.* This was a suit in chancery;—and error to the Circuit Court of the District of Columbia. And the point decided was, that a bond given in pursuance of articles of agreement between partners, may, in equity, be restrained by those articles: 2. That a complainant, in equity, may have relief against the admissions in the bill: 3. That a bond so executed may be restrained by the articles, if the departure be clearly proved; but it must be clearly proved, or equity cannot interpose: 4. The equity of the case must be clear to justify a court of equity in restraining the legal rights, acquired under a solemn contract: 5. When the plt. fails in this, he may have a decree for the settlement of an account; and if it were not claimed below, but first in the Supreme Court, it may open the decree, and direct an account, by reversing it, and remanding the cause to the Circuit Court, 6 Cranch,  
238, *Finley v. Lynn*.

CH. 225. directing it to take an account as to certain items named, if  
 Art. 6. the plt. require it; also directing to reinstate an injunction to stay an execution.

6 Cranch,  
 286, Smith v.  
 Maryland.

§ 15. This was a suit in equity. And it appears a court of equity has jurisdiction to enforce a conveyance of a confiscated estate by a trustee &c. It was error from the Supreme Court of the United States, sitting in equity, to the Court of Appeals of the State of Maryland, being the highest court of law and equity in that State, and which affirmed the decree of the chancellor of Maryland, in which the facts of the case were well stated, and were thus: July 4, 1774, the lands in question were conveyed by Anne Ottey, heir at law of William Ottey, to William Smith, one of the defts., and June, 1779, the legislature of Maryland passed an act for recording the deed not recorded in the time limited. July 5, 1774, Smith executed a bond of conveyance to Anne Ottey, widow of William Ottey; and when the act was passed, October, 1780, "to seize, confiscate, and appropriate all British property within this State," he held said lands under said deed, subject to the terms of said bond, and in trust for said Anne, then and ever after a British subject, and the lands were held in the same manner at the time of the suit. April 27, 1808, the complainants, Carroll and Maccubbin, gave information of this property being so held, to the State's agent, and claimed the composition held out by law on the said information. February 22, 1803, the governor and council agreed to sell the State's right to said lands to the complainants. And April 30, 1803, they were surveyed, and a plat returned, and a bond given for the purchase money. The bill was to compel Smith to produce in this court all deeds &c., and to convey to the complainants, and for general relief &c.; on the ground lands so held in trust for a British subject, or in which one had an equitable interest, but no legal estate, were confiscated by the laws of the State, and not protected by any treaty, (of 1783 or 1794.) The State courts decreed in favour of the complainants. Smith appealed, and judgment affirmed, with costs. The material point decided, to the purpose of Federal jurisdiction in equity, was, that a writ of error lay to the highest court of a State; where the question is, if a confiscation under the State's law, was complete before the treaty of peace in 1783: and 2. If an equitable interest was by them confiscated, owned by a British subject, without office found, or entry or other act done, though not discovered till long after the peace. Here the question occurs on the said 16th section of the judicial act, was there not in this case a plain and adequate remedy at common law; might not Carroll &c. have sued Smith at common law, and recovered on said points

merely legal, except perhaps as to Smith's discovering and producing papers against himself and his *cestui que trust*? There never has been a doubt in Massachusetts as to the adequacy of an action at common law in such a case, nor, it is presumed, in Pennsylvania. The main question in this, seems to have been clearly a question of law, whether a mere act of the legislature confiscated these lands, and completely transferred the title to, and vested it in the State before the peace. This writ of error, in equity, was founded on the said 25th section of the judiciary act.

CH. 225.  
Art. 6.



§ 16. But if this case was properly in equity a material question, if not the most material one in it, was no doubt a mere question of law; that is, if the lands were legally confiscated. This question, a court sitting in equity, decided as being a part of the case; and this practice is supported in many cases. As in the Doctor and Student, it is stated as a general rule, that when a matter is in a court incidentally, or otherwise, as a part of the case to be decided in such court, it must decide it necessarily, and by the law binding the matter, although that law be not a part of the law, such court is appointed to decide and execute usually. For instance, the Spiritual Court usually executes and decides by the spiritual law. In this court a question of property arises in the case in trial, and as a material part of it to be decided by the rules of the common law; by this law this court must decide this matter at its peril; and it is no excuse it is unlearned in the common law. It must learn the law, or get advice what it is in the case. This rule is universal, and applies to all courts, wherever the law does not remove the cause to some other court for decision. A and B are joint-tenants of goods, A bequeaths his part to C, and dies; C sues A's executor in the Spiritual Court for the legacy, a proper subject of its jurisdiction. This court is bound to decide this bequest is void by the common law, as B as survivor is entitled to the whole. In this case a suit properly instituted for a legacy in the Spiritual Court, on the spiritual law, was found in the trial to depend solely on the common law; as that alone gave title to B to all the goods, and defeated the legacy. It has been but of late years the question of *prize or no prize* has been an exception to this rule. This question being to be decided by the law of nations, it is said that even the judges of the King's Bench "know nothing of this law." It is a part of English and our law, not a little singular, which teaches a court is bound, or supposed to know but a part of the law, and yet this law rigidly holds every citizen, at his peril, to know the whole law of the land, as his ignorance of any part of it is no excuse. General rule.

D. & Stud.  
p. 183 to  
188.

CH. 225.

Art. 6.

4 Cranch,  
177.5 Cranch,  
322.6 Cranch,  
176.6 Cranch,  
187, Kenne-  
dy v. Brent.5 Cranch,  
191.—5  
Cranch, 234,  
Bodley v.  
Taylor.1 Cranch,  
317, United  
States v.  
Hose.

§ 17. A court of equity has no jurisdiction to decide between a devisee of land under a will, and a donee of the same land by deed, where there is no fraud, all being a mere question of title, and no fraud, trust, or contract for equity. Ch. 114. a. 27, s. 13.

§ 18. So it has jurisdiction in a suit by the endorsee of a Virginia note against a remote endorser, where no action lies at common law. Ch. 190, a. 5, s. 3.

So the Federal courts of equity have jurisdiction over contracts to convey lands, and to rescind them for defect of title in the party contracting to convey.

§ 19. *Federal courts of equity have jurisdiction in trustee cases on the Virginia laws in the nature of foreign attachment.* The cases arising on these laws must be numerous, and many of them in that part of the District of Columbia, in many matters under the laws of Virginia. This was a suit against a marshal for not serving, seasonably, a subpoena issued out of chancery, when Kennedy filed his bill in chancery December, 1804, against one Johnston and Hampson, for a chancery process of attachment in Virginia, and the clerk issued it, being a subpoena in common form to answer &c., stating the object of the bill was to stay the monies and effects of Johnston in Hampson's hands, to satisfy a debt Johnston owed Kennedy. This is sufficient to show, that courts of equity execute these trustee laws of Virginia, in the very kind of cases the courts of common law in Massachusetts execute laws made to answer the same purposes. See cases on Massachusetts trustee debtor acts, Ch. 192. When assignees can sue in equity or not. 6 Cranch, 333.

§ 20. A prior entry in the land office in Kentucky under the Virginia land law, gives an equitable title to him who makes it against him who gets the first patent or deed of the same land, and affords a ground of Federal jurisdiction in equity. 4 Cranch, 171, how such entry may be made certain.

§ 21. To give a Federal court appealed to jurisdiction in equity, a state of facts must accompany the decree, made below, as the grounds of the case for the court appealed to to act upon. Such a statement was provided for in the judiciary act of September 24, 1789, and was revived by the repeal of the act of Congress of February, 1801; and seems to be essential in the nature of the case, and the only way in which the facts of the case can be carried up for the court above to act and decide upon, as in equity cases there can be no special verdicts to contain the facts. This was a writ of error to a Circuit Court, sitting in chancery, not an appeal.

§ 22. *Sufficient equity among joint purchasers to sustain a suit in equity.* Error to the Circuit Court in Georgia in a suit in equity. Demurrer to the bill for want of equity in it; and demurrer allowed below; but overruled above, and proceedings remanded. The bill was filed by an assignee of an assignee of one of the joint purchasers &c. against his co-partners and their common agent, for a discovery of sales and distribution &c. A, B, C, D, and E, December, 1786, agreed to purchase 200,000 acres, at their joint expense, and for their joint benefit, and obtained about 165,000 acres. E sold his right to Q on credit; he not having paid, assigned to P, who engaged to pay E, who had not been paid. W. as agent of all, sold 60,000 acres, and received payment in part, and was liable for the residue; refused to pay P his fifth; and the other defts. refused to divide the residue of the land, and to account for the profits; and the lands were liable in the purchaser's hands for the balance of the purchase money due to E, and money due to P. Held, on these facts the suit in equity was sustainable.

CH. 225.  
Art. 6.

4 Cranch,  
72, Pendle-  
ton & al. v.  
Wambersie.

§ 23. According to Lord Loughborough a court of equity has no jurisdiction to proceed against a *bonâ fide* purchaser for a valuable consideration, without notice; but he is to be left to his legal title, or to any legal title he can procure: 2: And in this case it was held, that if a deft. by his answer state a purchase for a valuable consideration, without notice, he shall not be compelled to answer further: 3. "Against a purchaser for valuable consideration without notice, this court (chancery) will not take the least step imaginable, not even to perpetuate testimony against him." Chancery has no jurisdiction to "attach upon the conscience of the party any demand whatever, where he stands a purchaser having paid his money, and denies all notice of the circumstances set up by the bill." 1 Eq. Ca. Abr. 322, 353 to 359, many cases shewing equity has no jurisdiction over a fair purchaser for a valuable consideration and without notice, having the legal title, though at first only second innocent mortgagee.

2 Ves. jr. 457,  
Jerrard v.  
Saunders.

What the  
purchaser  
must aver,  
Cooper's Pl.  
281, 286.—  
1 Vern. 246.  
—Ambl. 421.  
—3 Atk. 304.

§ 24. *Chancery courts have jurisdiction in dower concurrent with courts of law.* Error to the Circuit Court of Columbia, sitting in Alexandria, in chancery. Suit brought by Wren and wife, for dower in her former husband's estate sold to one of the defts., or for a just equivalent in money in lieu of her dower. One objection was, the remedy was at law, another clearly legal, that a devise to her barred her dower; both parties brought error. Held, 1. The court of equity had jurisdiction, (decided solely on English authorities, though the case was subject to Virginia law;) one reason, partition is involved in the case; another, a purchaser possesses the lands

7 Cranch,  
370, Herbert  
& al. v. Wren  
& al.



CH. 225.

Art. 6.



So in Eng-  
land, Coop-  
er's Pl. 135.

1 Johns. Ch.  
R. 131, 149,  
274, Phillips  
v. Thompson  
& al.—2  
Mars. 551.—  
1 Johns. Ch.  
R. 281.—See  
Ch. 93, a. 3,  
a. 41—  
4 Maule &  
Sel. 542.

2 Wheat. R.  
373, Lenox  
& al. v. Rob-  
erts.

who has not paid the purchase money, and she is willing to receive money in lieu of land, this a court of law cannot award to her. The act of Virginia as to dower does not vary the common law ;—exception, it allows an averment, *dehors* the will, that the provision in it is in lieu of dower. This law the Federal courts adopt. Held also, she must elect to have dower, and renounce the devise, before the court could decree dower ;—cause remanded. *Quare*, if her title be disputed.

§ 25. *Chancery may have jurisdiction where there is no legal contract, in a special case.* As where the contract is void by the statute of frauds, and specific performance not allowed, yet if the plt. be really injured, and in equity entitled to compensation, and has no legal remedy, or one doubtful or inadequate at any rate, equity will sustain his bill, and direct an issue of *quantum damnificatus* to assess his damages caused by the deft's. acts. And if a party sets up part performance to take a parol agreement out of the statute of frauds, he must shew acts clearly referring to and resulting from the agreement, such as a party would not have done but for the agreement, and with a direct view to perform it, and the agreement set up must appear to be the same with the one partly performed, there must be no uncertainty in the case.

§ 26. *Chancery has jurisdiction on promissory notes where law may not have.* As where the property of the United States Bank was assigned to assignees in trust to settle its affairs ; and it was doubted if they could have an action at law on such notes endorsed to the bank, and not endorsed or assigned to them especially. But held clearly, they had suits in equity against the parties to the notes. Demand on the maker is the last day of grace, (*quare*, as he is not bound to pay till that day has expired.) On his default, notice must go to the endorser by the next post of the following day. There was no special assignment of the notes ; the only assignment was a general one, in trust, of all the bank's property by the bank, by their deed to Thomas Willing, John Perot, and James S. Cox, their executors, administrators, and assigns, of all mortgages, judgments, suits, bonds, bills, notes, debts, &c. &c. with the ways, means, and remedies, to recover them upon trust, as in the deed. They assigned to the complainant. The court observed, "as the act of incorporation had expired, no action could be maintained at law by the bank itself." And it is understood this bill was supported on these grounds : 1. While the act was in force the President, Directors, & Co. assigned the property and chosed in action of the bank to Willing &c., and they vested in them with power to assign over : 2. It was doubtful if an action lay at law, and if so or not,

"the court will not give an opinion." It was enough there was not "a plain, adequate, and complete remedy" to be had at law, as expressed in the said 16th section of the said judiciary act. CH. 225.  
Art. 6.

§ 27. Though a court of law permits a plt. to sue on a bond lost, yet equity has a concurrent jurisdiction; but none on political treaties;—1 Ves. jun. 371; 2 Ves. jun. 56;—as in the India Nabob's case. 3 Bro. Ch.  
Ca. 218—4  
Bro. C. C.  
180.—Coop-  
er's Pl 28.

§ 28. If an estate be devised in trust for the payment of debts by A, and the trustees renounce, chancery can order it to be sold, and money arising to be applied to pay creditors ratably: 2. If the heir at law of the testator receive the rents and profits, he cannot retain, though bound in several bonds as his surety, but must share ratably with the creditors: 3. He must account for the rent and profits from the time of the bill filed, though at law he would account only from the time of the judgment. So chancery can allow an executrix without proof under 40s. the testator fairly charged in his account-book; cites 1 Vern. 283, 470. Moseley,  
124, Cham-  
bers & al. v.  
Harvest & al.  
  
Moseley,  
253, Moseley  
v. Bogle.

§ 29. *Fraudulent deed concealed or destroyed, chancery can order another deed &c.* As where the plt. charged by his bills that the deft., his father, tenant for life, remainder to the plt. in tail, had fraudulently cancelled the deed of settlement, and so sold the estate to one of the defts. and prayed a discovery, and to be relieved &c. To this bill, the deft., the purchaser, demurred; because the plt. did not make oath the deed was lost. Held not necessary, as the bill was to be relieved as to a deed fraudulently destroyed or cancelled, and to have another deed executed, and the plt. could have no remedy at law if he had the deed. But where a bill seeks to be relieved on the matter of the deed, because the want of the deed is the only foundation, the plt. to draw the cause from the jurisdiction of law to that of equity, an oath is necessary; but if if the bill seek no decree, but only the deft's. discovery, or to have a deed produced at the trial &c. the oath is not requisite, as it is not to be presumed the plt. would put himself to the trouble and expense of a suit if the deed were in his power or hands. When the plt. goes on the matter of the deed the court must see it, and so he produce it or swear it is lost. And 1 Vern. 59, 180, 241; 1 Ch. Cas. 11, 131. Moseley,  
192, 193,  
King v. King  
& al.  
  
1 Vern. 310.  
—3 Ch. R. 5.

§ 30. Equity views a bond conditioned to convey lands for money received as articles of agreement, and can decree the condition to be specifically performed; and when the obligee has been in possession twenty years equity will not oblige him to prove the money was paid. So it can decree a guardian's contract for the sale of timber to be specifically executed; so it can hold the answer of a *feme covert* to be equal to a fine Moseley, 37.  
  
  
Ib. 224,  
Mason v. Ma-  
son, 248.

Ch. 225. levied, if in no manner imposed on. Hence, if she join with  
 Art. 6. her husband in a mortgage deed of their estate, and answer to  
 the mortgagee's bill to foreclose, she is bound in equity, as  
 the mortgagee's deed is good in equity, though not at law.

Moseley,  
 256, Slater v.  
 Buck.  
 Several  
 cases, 2 Com.  
 D. 4 N 5,  
 704; cites 3  
 Ch. R. 11, 12.  
 —Ca. Ch. 32.  
 —3 Atk. 502.  
 —2 Brown,  
 650.

§ 31. *Where equity apportions rent &c., though the law will not.* As where the plt's. father created a rent charge out of the premises to himself for life, remainder to the plt. in fee, with power of revocation, and sold lands to the deft's. father, which descended to the deft.; of him the plt. bought one acre of them; afterwards finding his title to the rent, £30, he demanded it of the deft. and he paid it several years; and then finding &c., he said, he was discharged at law, he refused to pay it, and the plt. distrained. Def't. replevied, and the plt. filed his bill for an apportionment, and an injunction to the replevin, and so decreed. Held, 1. If one have such rent, and purchase a part of the lands, it is extinguished at law, but if part descend to him, it is apportioned, as the law works no wrong; but the purchase is his own act: 2. But here the plt. when he purchased, was, as the court presumed, ignorant of the rent, so of the fact, and not of the law, so relievable; as if one give a general release, a bar at law of all demands, shall be relieved in equity as to demands he was ignorant of: 3. The def't. paid the rent many years knowing the fact, so no excuse but his ignorance of the law which is no excuse. Decreed the lands stand charged against the def't. and all claiming under him with £29. 5s., the acre the plt. bought being 15s. and costs at law to the plt. and in equity, and a perpetual injunction against the replevin. And 1 Ch Ca. 31, 273; Cooper's Pl. 142.

Moseley,  
 113, Colmer  
 v. Colmer &  
 al.

§ 32. Equity sets aside the husband's fraudulent assignment of his estate in trust to give his wife a maintenance; as where to avoid maintaining her he so assigned. Held also, his not maintaining her was a breach of his recognizance to keep the peace towards her; also, if she sue for alimony, it is no plea in equity she has a separate maintenance or pin-money. And further, such an assignment will in equity be held void, so far as to subject his estate so assigned to her maintenance according to his estate, though by articles of intermarriage she had the interest of £4000 pin-money, if he in a manner voluntarily and causeless desert her, as he did, and went to Maryland. And equity alone can act on an estate in trust. 3 Kel. 187; 1 Ch. Ca. 250; 2 Ch. Ca. 102; 2 Vern. 671; 2 Com. D. Ch. Trust.

Cooper's Pl.  
 Introd. 27.

Moseley, 87,  
 Lord Fal-  
 mouth & al.  
 v. Innys &  
 al.—2 Vern.

§ 33. Equity can grant an injunction to quiet the plt. in the enjoyment of mines and a watercourse, he has peaceably enjoyed many years, without directing a trial. So after forty or 390.—5 Co. 101.—4 Co. 94.—Moseley, 58, 89, 145, 171, 196, 236, 311, 356.

fifty years quiet possession, though it do not amount to a prescription at law. So to establish one in the enjoyment of a mine or colliery before the right is established at law, for fear the mine should be ruined in the mean time, and a proper remedy can be had in no other court. So equity grants an injunction *quia timet* to stay waste, on affidavit of a contract for the sale of timber. Two issues ordered: 1. If the plt. had a right to the whole water: 2. He to bring an action of trespass to try if Innys had a right to break down the plt's. wears, and he to "plead the general issue, and give nothing in evidence but the mere right." Issue ordered &c.;—ordered also, to be tried at the bar of the King's Bench, both issues by the same jury, and a special jury to be returned and a view had. Injunctions, see Cooper's Pl. 143 to 158.

CH. 225.  
Art. 6.

§ 34. According to modern practice equity will sustain a bill for discovery, because otherwise the plt. cannot prove his case. But formerly the plt. was held to prove his bill by witnesses *viva voce*, before the court would decree it *pro confesso*. How the deft. is examined on his insufficient answers;—and if in custody and will not answer, is brought up by several *habeas corpus* before the bill is decreed *pro confesso*. 1 Vern. 228; 1 Ch. Ca. 238; Hob. 115; Cro. El. 692; 2 Ch. Ca. 237. The plt. cannot say an answer he has accepted, is no answer. Insufficient one, is none. 4 Ves. jun. 619.

Moseley, 383, Hawkins v. Croke, A. D. 1730.

§ 35. Equity can make good a defective execution of a power in favour of a wife; as where it was a power to make a jointure by deed under hand and seal, and it was executed by will, signed, sealed, and delivered. And 1 Vern. 40, 132; 2 Vent. 350; 3 Ch. Ca. 68, 69; Chan. 2 Com. D. 4 H 6, p. 688 to 692.

Moseley, 46, 370, Tollet's case; also 228.

§ 36. If household goods be devised to an executrix for life, though she must sign an inventory, equity will not hold her to give security. Equity will open a settled account, for reasons. Cooper's Pl. 278, 279.

Moseley, 15. —4 Vesey jr. 118.

§ 37. Equity can correct a mistake of the law, and order deeds to be delivered up accordingly. As where there were four brothers,—the second died, and the eldest entered on his lands; the youngest claimed them. They consulted a schoolmaster, who thought him entitled to them, and the eldest accordingly, by lease and release, conveyed half to him;—both gave bonds for quiet enjoyment. Youngest died, leaving the deft. his heir, a minor. Decree, the bonds and deeds be delivered up to the plt., the eldest brother, being obtained by mistake;—infant when of age to convey &c. The chancellor said, "the maxim of law, *ignorantia juris non excusat*, was in regard to the public, that ignorance cannot be pleaded in excuse of crimes, but did not hold in civil cases."

Moseley, 364, 365, Landsdown v. Landsdown.

CH. 225. Relief against an heir's bond for £9,000, he paying £4,000, the sum borrowed.

Art. 6.

Moseley,  
373.—2 Com.  
D. Chan. 3 F.

§ 38. Where equity can stay an action at law, or set a contract aside or not. A trustee buys the husband's estate for life at an under value, when he absconded from his creditors; chancery ordered a reconveyance for their benefit, repaying the trustee principal and interest. 1 Vern. 365.

3 P. W. 129.

—Osmond v.  
Fitzroy, 1  
Atk. 301,  
365.

§ 39. So where the father intrusted his minor son to a servant, the son came of age, and gave him a bond for £1000, unknown to the father, and unable to pay it, equity set it aside, as obtained by fraud, and breach of trust;—but not if no fraud or breach of trust, merely because the obligor is a weak man. Cooper's Pl. 172, 173.

Fonb. 124.—

Ch. R. 477.—

2 Atk. 25,

294.—2

Vesey jr. 199.

§ 40. So if a barrister at law engages to recover an estate to which B has right, and gets of B a bond to surrender to him half, when recovered. Decreed to deliver up the bond and to re-convey the estate, on paying his advances, and for his care. Cooper's Pl. 173.

1 Eq. Ca.

Abr. 56—1

Vern. 467.—2

P. W. 129.—

9 Vesey, 182.

§ 41. So a man advances monies to young persons, and takes their joint securities for large sums;—equity will deliver up his security to each, on paying the money advanced to himself. 2 Vesey jun. 199; 4 Bro. C. C. 350; 3 P. W. 131.

2 Ch. Ca. 87.

§ 42. A man who will not do equity, shall not have relief in equity. As if A sues B, who purchased in trust for him, and paid the money for making the conveyance, on repayment, A ought to pay all other monies due from him to B.

2 Vern. 579.

§ 43. Equity does not take away a reasonable benefit accrued to another by the strict rules of law.

5 Cranch,

288, Logan

v. Patrick.

§ 44. Patrick, of Virginia, got judgment in the Supreme Court of the United States, in ejectment against Logan of Kentucky. He filed a bill in equity against him to be relieved against the judgment, and to compel a conveyance of the land, and obtained an injunction to stay proceedings on the judgment, but the subpoena was not served in Kentucky. Held, the Circuit Court had jurisdiction, though objected it was served on the deft. out of his district. Rule of evidence the same in equity as in law.

2 Eq. Ca.

Abr. 44, 610.

§ 45. The court of equity grants a perpetual injunction after two verdicts on trials at bar. 1 P. W. 671. But see 4 Vesey jun. 206, 207.

Stra. 404.

2 Com. D.

Chan. 3 M. 1.

p. 509.—2

Vern 123.—

3 Ch. R. 10.

—2 P. W.

240.—Ca.

Ch. 276.

§ 46. Relief in equity in cases of fraud;—but it is not to be presumed in law or equity. Relief, if one by covin or art is drawn in to give double the price of a thing. p. 509. Or gives a bill for value received, where no value received. Id. Or has judgments against him for great sums, where only small sums are due. Id. Or wherever fraudulently drawn in

to make a contract, very much varying from what it ought to be. *Id.* Many cases, p. 509 to 516; 2 Eq. Ca. Abr. 478 to 483; 2 Atk. 254, 258; 1 P. W. 639; 1 P. W. 118, 120; 9 Vesey jun. 292; 10 Vesey jun. 423; 1 Vern. 60. CH. 225.  
Art. 7.

§ 47. In equity, as in law, the property of the partnership is not liable for the separate debt of a partner, until the partnership debts are paid. Assignee can be in no better condition than the assignor. 4 Vesey jr. 396, 398.

§ 48. *Foreign matters.* Equity executes in England an agreement made at Paris. Holds conclusive the sentence of a foreign court, having jurisdiction, and the persons within it. Also adjudges contracts according to the law of the place where made: and that an act of Parliament extends not to foreign plantations, unless named. Englishmen carry their laws with them into a new and uninhabited country. 2 Eq. Ca. Abr. 475, 476.—  
Moseley, 1.  
—2 Stra. 733.  
—3 P. W. 76.

§ 49. Equity subjects the husband's estate in the hands of another, to the wife's funeral expenses. 9 Mod. 31, 32.

§ 50. Equity can view monies bequeathed to be laid out in lands, as lands or as money. As if A bequeath £2000 so to be laid out, is as land, but if assets fall short, is viewed as money, and not specific. 2 Eq. Ca. Abr. 555.

§ 51. In revoking wills equity controls the law, where the beneficial interest is devised in one way, and so as to be separate from the legal estate, and then the testator takes that without any alteration. Also where having both when he makes his will, he disposes of the legal, and retains the beneficial estate. 7 Vesey, 564; 8 Vesey 106, 281; 5 B. & P. 401; 2 Vesey jun. 417; 3 Vesey 650; 11 Vesey, 563. 1 Vesey jr. 255.—6 Ves. 199, Har-  
mood v. Og-  
lander.—  
7 Do. 370.

ART. 7. *Power to correct mistakes in contracts or not.* 2 Cranch, 418, Graves & al. v. Bos-  
ton M. Ins.  
Co.

§ 1. This was an appeal from the Circuit Court in Massachusetts, on a decree in chancery. Graves and Barnwell in their bill stated they were equally concerned in a ship and cargo, called, &c.; that each got insurance in several places on a voyage described; but in each case intended for their joint and equal account. Among others, Graves in his proposals, called himself one of the parties interested, and used the word, *we*, &c.; but got the policy sued, filled in his own name only &c. &c. One object of the bill was to have the mistake corrected. Policy contained the words, "*as property may appear*;" but not the words stating the insurance to be for the benefit of all concerned. Held, the evidence of the insurers' knowledge of the insured's intention when the policy was made, must be very clear, to authorize a court of equity to conform the policy to such intention;—not so in this case. And the policy insures but Graves' half;—yet the court allowed it was proved Graves meant to insure the whole. But probable the company believed they only insured Graves' in-

CH. 225. terest. So the evidence,—and reasons stated. If one, mistaking his rights, pay money, may recover it back. *Nelson v. Suddarth*, 1 Hen. & M. 350.

2 Johns. Ch. R. 283.—*Emanuel v. Dane*, 3 Campb. 299.

§ 2. *Other such cases of alleged mistakes.* If a fact be stated in a deed or writing by mistake, chancery may order it corrected. But such mistake must be proved by very clear evidence;—and so by such evidence it must be proved what the original agreement was. See Ch. 40, a. 28, s. 13. Forms in equity. *Id.* And Ch. 194, a. 2, s. 31, bills, answers, and evidence. *Solomon v. Turner*, Starkie, 51.

Atk. 208, *Langley v. Brown*—2 Atk. 31, *Simpson v. Vaughan*.—3 Burr. 1906, *Carter v. Boehm*.—1 Vesey, 456, *Baker v. Paine*.

§ 3. If it be the intention of one party to a contract to include in it a certain interest or risk, and the intention is known to the other party, and he does not object, nor explain himself, nor ask any questions tending to explain, then it is but a mistake, in using inapt words to express the party's meaning, and is one of the usual grounds for chancery or equity to interpose upon, and to correct the mistake. 1 Atk. 545; 3 Atk. 388, *Joyne v. Statham*; 1 East, 335, *Maanas v. Henderson*; 2 Stra. 1183; 2 Vern. 554; Park, 200, 201, 208, 213. What is sufficient notice to the underwriter, the assured acts as agent, Ch. 44, a. 3, s. 14. *Dunlop's lessee v. Speer*, 3 Bin. 169.

§ 4. There seems to be no question but that a court of equity has power to correct a mistake made by the parties in forming a contract, when the mistake is clearly proved; and the real question is, when is it sufficiently proved. It is a general principle that the legal rights of the parties are not to be affected by equitable considerations, except where the equity is clear and material; and if the proof of a mistake is to vary the written contract, that proof must be full, and the matter mistaken, something material. And a court of law will act in the same way. As where a receipt is given in full of all demands, when the parties mean only some particular demand, a court of law corrects the mistake by confining the receipt to such particular demand. The real difference between law and equity in this respect, is in the proof of the mistake. The law does not admit the parties to testify or declare on oath, but depends on other evidence; whereas equity bears the parties, usually on oath, and sifts the truth out of them, in many cases in no other way to be got at; as will be seen generally in the cases in equity. And equity thus obtaining one fact after another from the parties, it of course allows each party to amend from time to time, as new and material facts are disclosed.

8 Cranch, 371, *Vowles & al. v. Craig & al.*

§ 5. What no mistake in the quantity of land sold.—Suit in chancery in Kentucky. A, in 1774, got a survey on a military land warrant, under Virginia, agreeable to the royal proclama-

tion of 1763, for 2000 acres, and sold for a valuable consideration, £3000, his right to the survey to B, and assigned the plat and certificate to him. He obtained a patent in his own name for the land. On a re-survey, it measured 2700 acres. Held, no mistake, A sold and received payment for all he was entitled to. Wrong was to the State if any. Bill dismissed.

CH. 225.  
Art. 8.



§ 6. "In every case between purchasers for valuable consideration, a court of equity must *follow*, not *lead*, the law." "In construing agreements I know of no difference between a court of law and a court of equity." 293. "Powers came into the courts of common law with the statute of uses, and the construction of them, by the express direction of the statute, must be the same as in courts of equity." In fact, neither court can make a will, devise, or contract for the party or parties, but each court must take either as it finds it, and both must equally find the true intentions of the party or parties, and alike follow them.

Dougl. 22.

Ib. 277, per Lord Mansfield.

§ 7. An agreement made, clearly by mistake, will be set aside in a court of law, of chancery, or of prize.

1 Wheaton's R. 440.

§ 8. If a trustee, executor, &c. concerned in selling, be a buyer, equity interposes &c. Cases of Guardian and Ward &c. 1 P. W. 118, 120; 2 Ch. Ca. 157; 2 Vesey, 547. Trustees selling and buying for themselves. 1 Vern. 60; 8 Vesey jun. 349; 4 Ch. Ca. 425; 2 Bro. C. C. 450; 3 do. 639; 5 Vesey, 680, 707; 6 Vesey, 631; 18 Vesey, 364; 3 P. W. 129, 131. Attorney and Client. 2 Vesey jun. 199, 204, Newman v. Payne; 7 Vesey, 599. But a deed will not be rectified in equity on account of mistake, surprise, or fraud, to the prejudice of a *bonâ fide* purchaser, without notice. Sugden's Vendors, 129.

3 Vesey jr. 740, 762, Whichcote v. Lawrence.—8 Vesey, 72, 343.

ART. 8. *How a court of equity looks behind the legal title.*

§ 1. Wherever the legal title to real or personal property is created by deed or writing, the law begins with that, and but rarely extends its inquiries behind it, or to the circumstances of the case existing prior to the instrument, judgment, or decree fixing the right or title in law; but it is otherwise in equity. A court of equity goes back to these circumstances, inquires into them fully, often aided by the allegations of the parties on oath. So in fact inquires often what such instrument &c. should have been, as well as into many extraneous circumstances, so as to get a full view of the whole case.

§ 2. Equity looks behind the patent; law does not. Title to land under the Virginia land law in Kentucky in question. As in a case of an appeal from a decree of the Circuit Court for the district of Kentucky, in a suit in chancery, brought by Finley to compel Williams and others, who had the eldest pa-

9 Cranch, 164, Finley v. Williams & al.—1 Wheaton's R. Appen. 469



CH. 225.  
Art. 8.



tent, to convey certain lands to Finley, which he claimed by virtue of his prior settlement. And held, the courts of law will not look beyond the patent, but courts of equity will ; and will give validity to the eldest entry against an elder patent : 2. Between pre-emption rights the prior improvement holds the land against a prior certificate, entry, survey, and patent : 3. An entry on a pre-emption warrant impliedly includes the improvement, though not expressed ;—rather depending on a law of Virginia, usually called the previous title act, and other acts specially providing as to improvement. In the year 1773, Finley marked and improved the land in dispute. Williams' grantor marked and improved in 1775 the same land, and was first in all the other steps to get a legal title. His certificate of improvement, entry, and patent, were before Finley's. And in ejectment Williams & al. recovered, on their prior patent, and the Circuit Court, sitting in equity, thought they had the better title. But their decree was reversed by the Supreme Court, which decreed Williams & al. to convey. It deserves attention that this court was influenced by the principles of equity, established in such cases by the courts of Kentucky ; and said, the Federal courts had "conformed to this practice and adopted the principle." This may be no deviation from the above position that the English code of equity is our Federal rule in equity. These Kentucky principles are foreign to that code ; nor did the Federal Courts, sitting in equity, appear to hold themselves bound by them. But had such a case arisen in Massachusetts there would have been no doubt but that the common law afforded a plain, adequate remedy. *Willink's lessee v. Miles*, 1 *Peters' R.* 299 ; *Penn's lessee v. Klyne*, 4 *Dallas*, 402.

See *Talbot v. Callaway*.—*Harden*, 35, *Brown's lessee v. Gallo-way*.

7 *Cranch*, 2, 22, *Fitzsimons & al. v. Ogden & al.*

§ 3. In this case a court of equity went beyond a legal title acquired by *Ogden & al.* on a bill praying for a conveyance by them to the complainants of certain lands in New York, on the complainants' (trustees) praying such proportion of a judgment (a lien on the lands) recovered by *Talbot & Al-lum* against *R. Morris*, who conveyed to the complainants the lands, 500,000 acres, subject to the lien of this judgment. After several assignments of it the deft., *Ogden*, acquired his legal title under it, the last step in the title in the case ; deft. before had an equitable title as the complainants had. In this state of the case the court said, their title "is placed upon the well known principle which governs a court of chancery, that between merely equitable claimants, each having equal equity with the other, he who hath the precedency in time has the advantage in the right," and it was right for the defts. to get the legal title under the judgment. Decree for them. Though several questions were made, the material one seems to have been, whether the purchaser, *Ogden*, under the judgment, held

in trust or not for the complainants, either because he was not a *boná fide* purchaser for a valuable consideration, without notice, or because one of the assignors of the judgment had acted *malá fide*, so tainted the title under it, or because he had but an equitable right in it, a chose in action, and assigned that only as mere security for monies he had advanced at the request of the judgment debtor. It is to be observed that this judgment from its date was a lien on all the judgment debtor's immense tract of land in the county of Ontario: that under it a sale of this for \$5,200 was deemed a valuable consideration: and especially, though scores of chancery cases were cited in this suit, they are all English, no one a New-York case though there had been so long a court of chancery in that State,—another circumstance tending to show that by equity in our federal system is understood the English code of equity, and not the State equity found in the several States.

CH. 225.  
Art. 8.

§ 4. In this case the bill in equity was grounded on the equitable, that preceded the legal, title; and the plt's. bill failed for want of equity, because his prior equitable title merged in his subsequent legal title. Deft. demurred to the bill for want of equity. This stated that while the land lay in North Carolina one Dunlop made a regular entry and paid the State for it, and completed his contract; this was his equitable title: that the statute was void, passed to avoid this and other such entries &c.; and that afterwards Dunlop got a warrant to survey and a patent,—conveyed to Rhea, and he to the plt. The court said if the title be good at law, there is no case in equity. If any title in this case it is at law: if no title at law, there is none in equity; the equitable is merged in the grant. According to *Finley v. Williams* a court of law would not have looked beyond the patent, which in this case excluded the jurisdiction in equity.

7 Cranch,  
354, Preston  
v. Trimble.

§ 5. Where one may lose his equity by taking what gives him a legal right. Appeal from a decree of the Circuit Court for the District of Columbia, sitting in Alexandria as a court of equity. In 1795 Chambers & al. contracted to convey to Young a large tract of land in Virginia, for a part of which he gave his promissory note to Chambers, which by several endorsements passed to Grundy, who got judgment on it against Young;—was found Chambers & al. had title to but a small part. Here then Young might have his equity to be relieved against the note, the consideration failing; but Sept. 1798 he entered into a new agreement with Chambers & al. as a substitute to the old one, expressly to compensate Young for his loss in that. Not material whether the last agreement is performed or not, as the note was endorsed to Grundy before it was made; by this he lost his equity. His bill was to be re-

7 Cranch,  
548, Young  
v. Grundy.

CH. 225. lieved from the said judgment. Bill dismissed. He acquired a legal remedy on his new contract to a full indemnity.

Art. 8.

1 Vesey jr.  
371, 393,  
Nabob of the  
Carnatic v.  
E. I. Comp.  
A. D. 1791.

§ 6. The great Carnatic case. The nabob of the Carnatic filed his bill in equity in England against the East India Company, for discovery and account of rents and profits of his territories in India while in their possession as security for debt and for the balance, submitting to pay it if against him. The debts. pleaded that by divers charters, letters patent, deeds, acts of Parliament confirming the same, they, the debts. had given, granted, and confirmed to them, with other privileges, the sole privilege of trading to the East Indies and a right to send men, ships, &c. and to commission officers, to continue to make peace and war &c. for their advantage with any natives not Christians : that the plt. is a native sovereign, not a Christian : that all the transactions mentioned in his bill passed between him, as such sovereign, and the debts. in the exercise of their privileges, and related to matters transacted between them with regard to peace and war, and security and defence of their respective possessions ; and therefore are not cognisable in this or any other municipal court. The plea was overruled ; and the debts. having once amended, further time was refused, and they were compelled to answer immediately. Held, the India Company have neither an independent or delegated sovereignty, but are mere subjects. Plea must tender issuable matter.

7 Cranch, 34,  
Shirras & al.  
v. Caig & al.  
case in Georgia. See  
Georgia, Ch.  
223, a. 14.

§ 7. Mortgage as equitable and legal interest. A has the legal and equitable title to a moiety of a tract of land ; B has the legal, but not equitable, title to the other moiety, undivided ; and A has a power from B to sell his half. A mortgages the whole to C, but does not profess or appear to intend to make use of B's power ; A mortgages only his own moiety : 2. If a plat referred to in a deed, as annexed, is in fact never annexed, nor recorded with the deed, it affords no aid to the description in the deed : 3. If one get a deed recorded as soon as the law requires, he cannot be guilty of a fraudulent concealment of it : 4. It is not necessary to make a mortgage valid, it truly states the debt meant by it to be secured, but stands as security for the real equitable claims of the mortgagee, even though they arise after the mortgage is made, but on the faith of it, and before the mortgagee has notice of another's equity : 5. This equity may arise by reason of verbal agreements and entries in merchants' books ; though mortgages to be valid must be recorded in a year after made, as in Georgia, attended with possession : 6. If one having an equitable interest be in possession, and the mortgage deed notice it, the mortgagee is bound to take notice of it, and takes the property subject to every prior equity : 7. If a mortgage pur-

port to secure a large sum as due to the mortgagees jointly, but is *bonâ fide* intended to secure different smaller sums due, when the mortgage is executed, to particular mortgagees, advances afterwards to be made, and liabilities to be incurred to an uncertain amount, it is valid in equity.

CH. 225.  
Art. 9.

ART. 9. *Who holds in trust for others, or by absolute title to his own use.*

§ 1. This is a very important branch of equity. This question arises directly or indirectly in most great cases in equity, and is usually among the most difficult to be decided. Three maxims, however, in relation to it are clear and inviolable: 1. Wherever one holds in trust for others, and the ends of it are answered, he shall be compelled &c. whenever sufficient reasons therefor exist: 2. On the other hand, whenever one holds by an absolute title at law to his own use, and no fraud, he is out of the reach of equity: 3. As a *legal* is higher than an *equitable* title, the former shall never yield to the latter, unless where that is strong and clear, and some defect is in the former. Also in relation to this branch in equity four difficult questions often arise as to evidence: 1. When is a trust not in writing void by the statute of frauds: 2. When is a trust resulting merely from legal operation and without writing, good and valid: 3. When may *parol* evidence be admitted to explain writings, and shew the deft. holds in trust: 4. In what cases is it proper for parties by their bills, answers, and replications, to shew the deft. holds in trust or not.

§ 2. It will be observed this question, if the deft. so holds in trust or by such title, has many times been a material question in the cases already stated in this work to other purposes. For instance, in *Watts & Massie*, if Massie held the 1000 acres in trust for Watts, and so enforced to convey to him, or by a good legal title to his own use. So in *Fitzsimmons v. Ogden*, *Smith v. Maryland*, *Jerrard v. Sanders*, *Finley v. Williams*, &c. &c.

§ 3. Though if the deft. hold by an absolute title, as above, he is out of the reach of chancery, yet very often a court of chancery must well examine the case to ascertain which way he holds in trust, or by title as aforesaid, in order to sustain or reject the bill filed in a proper manner. This too, is often a case in a court of law; the plt. sues in it to recover what he calls his or something due to him, and it is objected his only remedy is in equity, the court must well examine the case to ascertain whether it shall sustain the action or dismiss it, and tell him he must sue in a court of equity.

§ 4. *Vendor viewed as trustee for purchasers for want of a legal remedy.* As under a sale by order of court for the ven-

## CH. 226.

## Art. 9.

1 Wheat. R. 179 to 207, Hepburn & Dundas' heirs and exrs. v. Dunlop & Co. Dunlop & Co. v. Hepburn & Dundas' heirs and ex-  
 cutors.—3 Wheat. R. 231, this decree explained as to rent.

1 Wheat. R. 432, Russel & al. v. Trustees of Transylvania University.

7 Cranch, 218, Conway's executors and devisees v. Alexander.

dee's benefit. These causes were appeals from the chancery side of the Circuit Court of the District of Columbia for the county of Alexandria. Many suits at law and in equity had before been in court between these parties. As to the matter here in question, see Hepburn v. Auld, agent of Dunlop & Co. aliens, Ch. 94, a. 4, s. 3; Ch. 114, a. 27, s. 16; a. 5, s. 17. this chapter; 1 Cranch, 321; 5 Cranch, 262. Many points were decided in these cases. The material one in this place is this, on a contract made by Hepburn & Dundas to convey 6000 acres of land in Kentucky to Dunlop & Co., which, had the contractees been citizens would not have been constructed to make the contractors trustees; but as the contractees were aliens, the contractors were deemed trustees for the person or persons to whom the land might be sold; and conveyances "decreed to be made to such persons as may become the purchasers of the land under the decree of this court," at auction to be regulated by Dunlop & Co. The conveyance decreed to be in fee simple to the purchaser or purchasers, "with a general warranty, and free of all incumbrances."

§ 5. An appeal from the Circuit Court of Kentucky, in chancery. The plt's. bill was to enforce the debts. to convey to him 2000 acres of land in Kentucky, held by them as the land of M'Kee, confiscated to the State in the American revolution. The plts. claimed this land and conveyance, on the ground they had an equitable title to it, and the debts. as trustees held it for the plts. The equity they claimed arose from his sale of another tract of land, he, as said, erroneously supposed he was legally entitled to under the same warrant and survey. The plts. failed, because their evidence did not prove the equity they alleged; so did not prove the debts. held in trust for them. It seems in this case had the plts. proved an equitable title, the court would have held the debts. as so holding in trust, if their claims should not have been neglected too long.

§ 6. *Trustees not in mortgage, but on a conditional sale.* Appeal from the Circuit Court in Columbia, sitting in chancery. Question—if the trustees held in mortgage or not. March 20, 1788, a deed was executed between Robert Alexander of the first part, William Lyles of the second, and Robert T. Hooe, Robert Muire, and John Allison of the third part; by it Robert Alexander for £800 paid by William Lyles, conveyed to him in fee absolutely, twenty acres; and a hundred and forty acres, Alexander by said deed conveyed to said Hooe, Muire, and Allison, in trust to convey the same to said Lyles at any reasonable time after July 1, 1790, unless said Alexander paid said Lyles on or before that day £700, with interest from said 20th day of March 1788, and if A. so paid,

then to reconvey to him. Said trustees covenanted to convey to said Lyles, if said £700 and interest were not so paid, and to reconvey to said Alexander if so paid. He covenanted for further assurances as to the hundred and forty acres, and warranted the twenty acres to said Lyles and his heirs. Said sum was not so paid, and July 19, 1790, said trustees conveyed said one hundred and forty acres to said Lyles in fee. August 23, 1790, he for £900 sold both pieces to Richard Conway and his heirs; he, April 9, 1791, made a partition with Charles Alexander; Richard Conway soon entered and made permanent and expensive improvement. January or February Robert Alexander died testate, but did not in his will mention said hundred and forty acres, but devised it, if at all, in the residue to his son, Walter, the complainants. He came of age Nov. 1803, and brought his bill in equity to redeem in 1807. Held, not a mortgage but a conditional sale. It is to be observed in this case, that the court in order to ascertain if the parties mean a mortgage or a conditional sale, allowed evidence to be admitted to prove all, each and both of them said and did for many years. Several material rules of construction &c. laid down &c. : 1. As that a conditional sale to be strictly complied with if intended, is legal : or 2. One may sell lands with a reservation to repurchase them at a fixed price at a time specified, in equity : 3. The law does not allow a real mortgage to be converted into a sale : 4. Doubtful cases are usually viewed as mortgages, as debtors usually act under the pressure of circumstances more than creditors do : 5. If the vendee must be restrained to his debt, that ought to be secure : hence, 6. It is "a necessary ingredient in a mortgage, that the mortgagee should have a remedy against the person of the debtor : " 7. "If this remedy really exist, its not being reserved in the terms will not affect the case : " 8. "But it must exist in order to justify a construction which overrules the express words of the instrument : " 9. No doubt on a clause to repurchase, as on a clause to purchase, the time of performance by the repurchaser must be strictly preserved, as it is in the nature of a condition precedent. Several good cases cited.

§ 7. A mortgage is viewed as a personal contract, and a mortgagee has no interest beyond his money. It is also a rule in equity, that a mortgagee having possession shall never be deprived of it before payment. Vin. Abr. title Mortgage, C. 15. Equity does not enlarge the mortgagor's time to redeem after six years' acquiescence under a forfeiture by his own consent, especially if any improvements have been made on the estate. Nor shall there be any redemption after long possession, settlements made and estate improved.

CH. 225.  
Art. 9.

2 Eq. Ca.  
Abr. 591, 599.  
—Prec. in  
Ch. 99.

Courtney v.  
Langford.

CH. 225.

Art. 9.

9 Cranch, 43,  
Terrett & al.  
v. Taylor.

§ 8. If a party, as vestry men, &c. buy lands of A in fee, and he or his heirs be *estopped* by his warranty to claim them, chancery will enjoin him or them not to pursue an action to recover them, though the party, as vestry men &c., have not legal powers to hold such lands, for want of corporate powers to such purpose. As in Virginia where the vestry in the episcopal church acquired lands, but by law was a corporation only for the purposes of holding personal estate; and a statute passed to transfer such lands (among others) to trustees of the poor, adjudged void. See also, 3 Dallas, 386, *Calder & ux. v. Bull*. If a State erect and endow a university, it cannot repeal the grant. Case in North Carolina, 2 *Heywood's R.*, *University v. Foy*.

4 Wheat. R.  
1 to 51, *Bap-  
tist Associa-  
tion v. Hart's  
exrs.*

Many cases  
cited.

§ 9. An association not incorporated at the testator's death cannot take a charity legacy, though after incorporated. In 1790, Silas Hart of Virginia made a bequest to the Baptist Association that annually met in Philadelphia, to be a perpetual fund for the education of baptist youth for the ministry. In 1792, the legislature of Virginia repealed all English statutes, including 43 Eliz. ch. 4. In 1795, the testator died. In 1797, the legislature of Pennsylvania incorporated this society, which had existed many years as a regular organized body before the date of the will, and was composed of the clergy of several baptish churches of different States, and of an annual deputation of laymen from the same church. Held, as above: 2. That the bequest could not be taken by the individuals who composed the association at the testator's death: 3. That there were no persons to whom this legacy could be decreed, were it not a charity: 4. And not sustainable in this court as a charity: 5. It seems that if a charitable bequest be made, and no legal interest vested, and which is too vague and uncertain to be claimed by those for whose benefit intended, cannot be established by a court of equity by its ordinary power, or by the king's prerogative as *parens patriæ*, independent of the statute 43 Eliz.; and if otherwise in England, *quære* if so in the United States. Hence, where that statute is not in force, all such vague bequests must fail, especially if there be no special statute appointing trustees or to give them effect.

But our court admitted that such a bequest as this baptist one would be good in England under the 43 Eliz., as there chancery would appoint trustees, and act upon the principle of *cy pres* &c. See many cases as to charities collected, 4 Wheat. R. App. 1 to 23, shewing what is a proper charity or not &c.

The court in this case seemed further to hold, that the equitable jurisdiction of the courts of the Union does not extend to cases not within the ordinary powers of a court of

equity;" so does not include a power like the king's prerogative, as *parens patriæ*. A bequest may be good by 43 Eliz.,—not so at law as to a parish not incorporated. Ch. Ca. 134, 267; Hob. 136, Collison's case; Flood's case, Hob. 136.

CH. 225.  
Art. 9.

Chief Justice Marshall said, in giving the opinion of the court, there were two motives for enacting the 43 Eliz.: 1. And greatest, was to give a direct remedy to the party aggrieved, who, where the trust was vague, had no certain and safe remedy for the injury sustained, who might have been completely defeated by any compromise between the heir of the feoffor and the trustee; and who had no means of compelling the heir to perform the trust, should he enter for the condition broken: 2. To remove the doubt which existed whether these charitable donations were included in the previous prohibitory statutes." The 43 Eliz. repeal the statute of mortmain of H. VIII., so far as it relates to charities; and the 9 Geo. II. as far as it extends repeals the 43 Eliz. 9 of Geo. II. is a new act of *mortmain*. "By the civil law a legacy to a charity, if there be a deficiency of assets, does not abate; by the English law it does abate. So the civil law is not our rule in this respect.

§ 10. Held, 1. The Federal circuit courts have jurisdiction in equity in every State, and in all the same powers and rules of decision: 2. On a bill in equity by the United States against the debtor of their debtor, he must be made a party: but 3. May be by an amendment after a decision on an appeal and a remanding: 4. To entitle the United States to priority on the act of Congress of 1799, ch. 128, s. 65, they must prove their debtor has made an assignment of all his property: 5. A State act, as the trustee act of Massachusetts, (Ch. 192) makes no difference: 6. The account must be taken between their debtor and his debtor made deft. This priority explained in a note.

4 Wheat. R.  
108, 121, U.  
States v  
Howland.

§ 11. Decided, 1. If A sell lands to B, and for purchase money not paid takes separate securities, A's equitable *lien* on the lands is waived; so by any acts of the parties shewing it is not intended to be retained: 2. If retained to a specified extent the *lien* is waived as to any greater extent. It seems in this case, that the vendor's *lien* for his purchase-money not paid in England, holds in the State of Georgia when not waived.

4 Wheat. R.  
255, 297,  
Brown v. Gil-  
man.  
Many cases  
cited. See  
Ch. 44, a. 5.

§ 12. Chancery case on a law for recording deeds in Ohio. Material points decided: 1. Recording a deed in a county in which the land does not lie, is no notice to after purchasers or mortgagers: 2. A *bonâ fide* purchaser without notice is not affected by his grantor's intention to defraud creditors. See *Sutton v. Lord*, Ch. 32, a. 2, s. 2. Distinction between amending and withdrawing an entry.

4 Wheat. R.  
466, 488, As-  
tor v. Wells,  
1 Rose, 308.  
—4 Wheat.  
496.



CH. 225. ART. 10. *How the plt. in equity must be able specifically to perform his part of the contract &c.*

Art. 10.

§ 1. It is an invariable rule in every code and system of equity, founded in the moral perceptions of mankind, and in sound practice, that if the plt. or complainant in equity, be not able to perform his part of the contract specifically, in a reasonable manner, to be judged of by the court, he cannot have a decree to compel the deft. so to perform his part. This rule, without exception, is not founded in fiction, as the rule that makes money land, and land money, is, but is founded in our moral sense of right and wrong. But one question can grow out of it, that is, what is this *reasonable manner* in the court's opinion. On the one hand, it clearly is not to be able minutely to perform every jot and tittle of the contract on his part, as to every inch of ground, and every mill of money. On the other, it clearly is to be able to perform, specifically, every material substantial part of his contract, as the court shall require. This ability naturally respects *time* and the *mode* of performance. As to *time*, we may safely lay down three rules: 1. The plt. in all events, must be able so to perform, when the decree is made to enforce the deft. to perform his part, for one reason, (among many,) it is the nature and form of a decree, in equity, in cases of specific performances generally, to order both parties to perform, and to direct how: this reason prescribes, and numerous cases in chancery books shew: 2. When the contract itself fixes a time of performance, then the plt. must be able to perform his part, except hindered by the act of God or of the deft; and then the plt. must be able and ready to perform the moment the impediment occasioned by such act is removed: 3. If no such time is fixed in the contract, but it leaves the time indefinite, then the plt. must be able to perform in a reasonable time, to be judged of by the court. As to the *mode* of performance, to be in a reasonable manner in the court's opinion, it is in vain to attempt to lay down rules further than as above, it must be of every material substantial part according to the court's sound construction of the contract. It will be observed, that these principles equally apply to the deft's. performance. And the "contract ought to be in writing, certain, fair in all its parts, and for adequate consideration." The mode of substantial performance by either plt. or deft. in the different cases, will vary according to the circumstances of each, however numerous. What is a performance in substance of a contract, is almost as much a question in law as in equity, as may also be seen in the legal parts of this work relating to form and substance.

This doctrine of specific performance, no doubt had its origin in the English chancery, in part, in the revival of the

See Hepburn's several cases.—14 Vesey, 205.

2 Johns. Ch. R. 370 &c.

civil law in Europe, late in the dark ages ; but applying only to the case in which the contract concerned a thing transferable. As in our case usually.

CH. 225.  
Art. 10.

§ 2. This was an appeal from the Circuit Court of Kentucky. Morgan's heirs filed a bill in it on deft's. bond, conditioned to convey 5000 acres of land in Ohio State, praying for a conveyance of it, if the said heirs were able to convey, and if not, for a compensation in damages, deducting 1000 acres in Kentucky, (to be sold,) the complainant's ancestor, by bond of the same date, was bound to convey as the consideration of the 5000 acres, deft. being insolvent, on the ground the complainants had an equitable lien on the 1000 acres for such indemnity. The bill was also against James Patton, to whom the deft. sold the 1000 acres, also C. Allen and James Scoby, for a fraud, in getting a sale thereof, under a judgment by collusion ; bill also prayed this be vacated &c. Deft. confessed his inability to convey the 5000 acres, and alleged fraud in the original contract &c. Allen, Patton, and Scoby, denied fraud, and claimed a good title under the sheriff's deed. Circuit Court, November, 1814, dismissed the bill as to Allen, Patton, and Scoby, and held the deft., Morgan, liable for the value of the 5000 acres, and directed a jury to ascertain it. May, 1815, a jury estimated the 5000 acres to be worth then \$20,000 dollars. December 11, 1795, \$5000. December 11, 1796, \$6250. Decree for the \$6250 with interest for the complainants, and costs against Morgan, and ordered execution against his estate ; also appointed commissioners to sell and convey to the purchaser, if the money could not be raised by the execution. Complainants too directed to join in the conveyance, and to stipulate to pay 20s. an acre for any of the land that might be lost by a superior title. Complainants were of Pennsylvania, and deft. of Kentucky. Morgan appealed. Points decided in the Supreme Court : 1. One of the complainants removing to Kentucky, pending the suit, did not affect it : 2. Necessary all the co-heirs of Morgan deceased join in the bill.

2 Wheaton's  
R. 290, Morgan's heirs v. Morgan & al.

§ 3. It is a universal rule of equity, that he who asks for a specific performance, must be able to perform himself. Hence the complainants not being able to give a title to the 1000 acres, free of incumbrances, were not entitled to a decree of specific performance. The incumbrance was said judgment, and sale under it, not reversed, though thereby 666½ acres, worth thousands of dollars, was sold for \$1,372½. It does not appear that this jury thus employed only to assess damages, was objected to in the Supreme Court. A jury for this purpose of assessing damages, where lying only in a jury's discretion, is a valuable feature in our equity system, not in

CH. 225.  
Art. 10.

that of the chancery of England, which sends such matters to be tried in another court. The complainants, before they obtained their decree, should have reversed the said judgment, and removed the said incumbrance, a matter of substance, as it at least embarrassed the title. Had they done this, they would have been able to perform, and the decree of the Circuit Court had been generally correct. This, it will be also observed, ordered both parties to perform. And the two bonds were viewed as making but one contract as to the ability. See also Hepburn's cases; see a. 5, s. 14. Where a trifling incumbrance, or right remotely possible, as the royal right, formerly, to part of certain mines in America, is no objection to specific performance. So an old foot-way over a small piece of pasture, not used for many years, and probably never will be, and especially if known to the contractee when the contract was made. Chancellor in England has no power to summon a jury.

3 Bl. Com.  
48.—1 Fonb.  
38, Denton  
v. Stewart;  
and notes.—  
12 Vesey,  
395.—17  
Ves. 273.

§ 4. If the deft. disable himself specifically to perform and convey a title, equity will retain the bill, and appoint a proper officer to assess the damages of the plt., (if not merely in a jury's discretion only.) But no such appointment is made, or issue directed of *quantum damnificatus*, (but in very special cases,) on a bill for such performance, if the party be not entitled to it, for the right of specific performance is the foundation even of damages.

2 Wheaton's  
R. 336, Col-  
son v.  
Thompson.—  
See also 2  
Ves. jr. 243,  
Mortimer  
v. Orchard.—  
1 Desaus. Ch.  
R. 480, Neuf-  
ville v.  
Mitchell.—2  
Desaus. Ch.  
R. 257.

§ 5. Appeal from the Circuit Court of Kentucky in chancery. Thompson, the complainant, filed his bill for a specific performance of an alleged contract, to convey to him one third of 25,000 acres, held by the deft., as a compensation to the plt. for locating and surveying the same. Bill dismissed. 1. No proof of the contract: 2. That stated by the complainant, as entitling him to the customary allowance, and that was one third, and no proof of such custom, he failed in proving, as he ought, a contract of terms so precise as not to be reasonably misunderstood by either party: 3. He neglected to perform his part; as he neglected to locate and survey the land; and his excuse, he was prevented by Indian hostilities, had no foundation in fact. The decree reversed of the Circuit Court, awarding the conveyance prayed for. Caldwell v. Myers, Hardin, 553; 1 Ball & Beatty, 241.

8 Cranch,  
471, Pratt &  
al. v. Carroll.

§ 6. *As to a specific performance of a contract.* Appeal from a decree of the Circuit Court of the District of Columbia, on a bill brought by Pratt & al. for the specific performance of a contract to convey lands. D. Carroll conveyed a large tract of land in said district to trustees, a moiety thereof to be conveyed to the use of the public, and a moiety to his use. Held, where circumstances have so changed, that nei-

ther party to the contract can derive from its execution all the benefit originally intended and expected, equity will not decree a specific performance after a lapse of seven years, though one party has expended much in part execution of it, and though the first default was the other party's, and though this probably prevented the party so performing in part, performing *in toto*. One party contracted to convey some of his house lots to the other in said district, and he to build houses on them, to enhance the value of the property on both; but their objects failed by the building there taking a different turn.

CH. 225.  
Art. 10.

§ 7. Held, that where a court of equity gains jurisdiction of a cause for one purpose, it may retain it generally.

10 Johns. R. 587.

§ 8. Equity will not decree a specific performance of an agreement made by one intoxicated, though not occasioned by the contractee, nor order it to be given up; but will leave the parties to take their legal remedies. See *Say v. Barwick*, 1 Vesey & Beames, 195. And the legal representatives of such intoxicated person may avoid such contract. 1 Wash. 164, *Reynolds v. Walker*.

*Cragg v. Holme*, 18 Ves. jr. 14.—*Wigglesworth v. Steers*, 1 Hen. & M. 69, 71.

§ 9. Equity does not enforce specific performance, when it will be attended with hardship. Nor if the party called on to do an act, is not legally able to do it. Nor if doing it will subject him to a new action for damages. *Sugden*, 159; 2 Ves. 307; 1 Desaus. Ch. R. 163; 1 Ball & Bea. 241, *Ellard v. Lord Llandaff*; *M'Dermid v. M'Castland*, *Hardin*, 19; 3 Cranch, 242; 2 Ball & Beatty, 56.

*Sugden*, 155, cites *Fain v. Brown*.

§ 10. *Pro tanto*. Where the vendor cannot execute his whole contract, and the vendee elects what he can execute, the rule is, a person so contracting is bound by his assertion in his contract, and if the vendee chooses to take as much as he can have, he has a right to that, and an abatement of the price. This rule holds in the United States as well as England, and is very different from the rule that obliges the purchaser to take a part and pay for it when he is not in fault, and when the vendor is unable to fulfil his contract. The *pro tanto* doctrine, in its nature, is incapable of any settled rules. 10 Ves. jun. 516; *Chinn v. Heale*, 1 Munf. 63; and *Hardin*, 41. In *Waters and Travis* also held, if the vendor convey for a valuable consideration *bonâ fide* to a third person, without notice of the previous contract of sale, and before it is executed, the third person will hold the estate. This legal power in the vendor, between making the contract of sale and its execution by a conveyance, (among other considerations,) shews how absurd the chancery doctrine is, that the estate is the vendee's to all intents, from the time the contract to convey is made. This doctrine, however, is admitted generally

9 Johns. R. 450, *Waters v. Travis*, in the court of errors, A. D. 1812, and many cases therein cited, all English but two or three.—See also *Dale v. Lister*, 16 Ves. jr. 7.—See Ch. 225, a. 5, s. 19.

CH. 225. in the United States ; and has given rise to numerous suits.

Art. 11. As to the doctrines, *pro tanto* and *cy pres*, there can be no end to the distinctions and cases that may grow out of them, for it is in its nature so vague, that each and every case must rest on its own circumstances, and the mere discretion of the chancery judge. But in a late case it has been decided, that independent of special circumstances, the general rule is, that the court cannot compel a purchaser to take an indemnity, or the vendor to give it. This rule, if adhered to, will do away many of the evils of the *pro tanto* and *cy pres* doctrine.

1 Ves. &  
Beam. 225.—  
Sugden's  
Vendors, 219.

ART. 11. Defects in the quality of property sold or contracted to be sold must be numerous, and where there are such defects they are the loss of the vendor or vendee according to circumstances. But as numerous as they may be, a suit in equity can be supported by reason of them, but on the grounds of contract, or fraud of some sort. In other words, the seller is not liable for them unless he warrant or deceive. But in equity, as in law, there are several rules of decision.

Dyer v. Har-  
grave, 10  
Ves. jr. 505.—  
1 Ball & Beatty,  
350.—Ch.  
62, s. 1, s. 14,  
15.

§ 1. If the buyer, when he agrees, knows the defects, he is understood to regulate his price accordingly, to take the property as it is ; and has no suit on account of them, even if there be a warranty, or false description, if he knows it. As if A contracts to sell an estate to B, and describes it as lying in one tract, when B knows it is in several, and its situation, B must complete the contract, and take the estate, without even compensation for the difference in value of a farm in one tract and one in scattered parts. This case followed the law, as even at law a warranty is not binding where the defect is obvious,—as a horse with a visible defect, or a house without a roof, warranted as in perfect repair. So in Virginia if the purchaser of land knowing the seller's title is defective as to part, agrees and pays interest on the purchase money from a certain day, he has no relief from paying it, on the ground he cannot get possession of a part of the land he knew when he agreed was held by a third person.

Mayo v. Purcel,  
3 Munf.  
243.

Lowndes v.  
Lane, 2 Cox,  
363.

Oldfield v.  
Round, 5 Ves.  
jr. 508, 509.

6 Ves. jr. 678.

§ 2. The maxim *caveat emptor* applies in most cases. Hence if there be defects in the estate, if patent, the buyer can have no relief. Sherwood v. Salmon, 2 Day, 128. As where a meadow was sold, and no notice of ways over it was given, a specific performance was decreed with costs ; and Lord Roslyn said he could not help the purchaser who did not choose to inquire ; this was a sale at auction ;—not a latent defect. Perhaps this case depended on the degree of negligence in the buyer in not inquiring. See 1 Ball & Beatty, 350 ; and Legge v. Crocker, 1 Ball & Beatty, 506 ; and Shirley v. Davies in the Exchequer ; and Ves. 307 ; 13 Ves. jun. 78.

§ 3. If the seller give a false description of the estate, the purchaser may, at law, or in equity, rescind the contract. As if the vendor describe the estate as being but one mile from a market town, when it is four miles, the purchaser may avoid the contract; for in this case there is fraud in false description. And *Fenton v. Brown*, 14 Ves. jun. 144. And in the nature of the case the misdescription is not a subject of compensation. The same rule as to an estate out of repair, described as being in good repair, and its condition not known to the purchaser.

CH. 225.  
Art. 11.

Norfolk,  
Duke of, v.  
Worthy, 1  
Campb. Ca.  
837.  
Grant v.  
Munt, Coop.  
173.

§ 4. Though the buyer properly cautious may discover the defects, yet where the seller industriously conceals them, he has no relief in equity. As where he represents the estate as clearing a net value \$100 a year and takes no notice of an annual expense that takes half the sum, and this circumstance he industriously conceals during the treaty, his bill for a specific performance will be dismissed. 16 Ves. jun. 390. The purchaser may if he chooses waive the incumbrance, not disclosed at the time of the bargain, and claim and have a compensation for it and a specific performance decreed.

Shirley v.  
Stratton, 1  
Bro. C. C.  
440. Seaman  
v. Vawdray.

§ 5. If the vendor give a particular and false description of the estate, and the buyer cannot be proved to have had a distinct knowledge of its condition, he will be entitled to a compensation, though compellable to perform the contract. As if the seller describe the house sold as being in good repair, when not so; here is a false description, so a fraud; and the buyer is entitled to a compensation for the defects, and if this will make him whole he must take a conveyance, but may rescind if the defects defeat his main purpose.

Sugden's  
Ven. 224, 225.

§ 6. If the defects be latent, and the vendor aware of them, and the vendee by the greatest attention cannot discover them, and has no notice of them from the vendor, the vendee may rescind the contract at law or in equity: in such a case concealment is fraud. But if the seller agree to sell the estate with all its faults, the better opinion is, the buyer takes the risk of the defects; and there must be a specific performance, (though Lord Kenyon thought otherwise,) if the seller use no artifice to conceal them, and to prevent their being discovered by the purchaser,—for those words must put him on inquiry.

Mellish v.  
Motteux,  
Peake's Ca.  
115.—Bagle-  
hole v. Wal-  
ters, 3 Camp.  
Ca. 154.—See  
1 Ball &  
Beatty, 515.

§ 7. But if the words *all faults* be added, the seller is liable for defects, if he prevent the buyer's discovery of them. As where A sold a ship to B with *all faults*, and without any defects whatsoever, and represented her nearly as good as new, when she was quite unseaworthy, and he kept her constantly afloat so that her defects could not be discovered. Held, as the seller was guilty of fraud, the words *all faults* &c. would

Schneider v.  
Heath, 3  
Campb. Ca.  
506.—Pick-  
ering v. Dow-  
son, 4 Taunt.  
779.—Jones  
v. Bowden, 4  
Taunt. 647.

CH. 225.

Art. 12.



not protect him. Fraud could be in a false representation, or in using means to conceal the defects. This fraud vitiated the contract. And further held, it was not material whether the seller knew of the defects or not, as he described the vessel as in a good condition, this false affirmation was a fraud, even though ignorantly made.

ART. 12. *Defects in the quantity of estates agreed to be sold &c.*

13 Ves. jr.  
427; 16 Do.  
516.—1 Ves.  
jr. 211, 213.  
—6 Ves. jr.  
339.

§ 1. If the vendor thinks he has sold less than the purchaser thinks he has bought, the fair way is to set the contracts aside; but the whole estate must be conveyed if both understood that was the bargain. So if both understood a part. *Williams v. Calverly*. Small variations in general descriptions of lands are not material, *de minimis lex non curat*. So in equity.

2 Hen. & M.  
164 to 181,  
*Nelson v.*  
*Mathews &*  
*al.*; several  
Virginia and  
English cases  
cited.

§ 2. If the vendor's title papers afford him a knowledge of a deficiency, and he conveys a tract of land with general warranty, as containing by estimation 500 acres, more or less, he is bound to make good the deficiency to the purchaser. 2. A deficiency of 8 acres in 552 acres is not more than one who buys for more or less may well expect. 3: Where land is sold with warranty, and the quantity falls short, he must compensate the value of the deficiency at the time of the contract. 4. If several tracts of land be sold, as adjoining each other, for a gross sum, and no specification be made at the time of the contract, of the quality or separate value of each parcel, and there is a deficiency in the quantity of each, the buyer is entitled to compensation for such deficiency, according to the average value of the whole tract.

2 Eq. Ca.  
Abr 688,  
*Shovel v.*  
*Bogan*.

§ 3. Where fraud is made the equity. As where A agreed to sell lands to B at so much an acre, and B enquired how many acres; and if A do not inform him of the true number of acres, it is a cheat, and there is no need of an express warranty in the deed of conveyance, the fraud is the equity. B thinks the account of A is right and fair and pays the price. A decreed to refund what was paid over the true number of acres.

*Quessel v.*  
*Woodlief*;  
cited 2 Hen.  
& M. 173,  
174.

A agreed to sell B about 800 acres of land at £4 an acre, and the deed was for 800 acres more or less. Both A and B were mistaken as to the quantity. Measured 608 acres only. Decreed in the Supreme Court of Errors that A refund the price of the deficiency, 192 acres, being too much to be covered by the words *more or less*. Decree below reversed. Cited 1 Call, 317.

*Sugden's*  
*Ven.* 230,  
231, cites  
*Hill v. Buck-*  
*ley*, 17 Ves. jr.  
391.—9 Johns. 465.

§ 4. The rule is the same though the land be not bought or sold by the acre professedly, the presumption is, that in fixing the price both parties regard the quantity of land. Hence

the rule is that if a misrepresentation be made as to the quantity, though innocently, the purchaser shall have what the seller can convey, abating the price out of the purchase money, for so much as the quantity falls short of the representation.

CH. 225.  
Art. 12.

§ 5. A purchaser has a right to have the contract rescinded *in toto*, where there is a great deficiency in the quantity. *Glover v. Smith*, 1 Desaus. Ch. R. 433.

§ 6. But if the words, *by estimation*, or *more or less*, be used, a small quantity more or less is disregarded. In one case of this kind, the land fell short two fifths, (2 Freem. 106) and no relief. Cited *Twysford v. Warcup*, 1 Finch, 310. See *Marquis of Townsend v. Strongroom*; *Rushworth's case*, Clay. 46; *Grantland v. Wight*; *Joliff v. Hite*, 1 Call, 301; *Smith v. Evans*, 6 Bin. 106; *Boar v. McCormick*, 1 Serg. & Rawl. 166; *Dagne v. King & wife*, 1 Yeates, 322; *Mann & al. v. Pearson*, 2 Johns. 37; *Howes v. Barker*, 3 Johns. 508; *Powell v. Clark*, 5 Mass. R. 355; *Jackson v. Ballinger*, 15 Johns. 471; *Jackson v. Defendorf*, 1 Caines, 493; *Howe v. Bass*, 3 Mass. 380; *Snow v. Chapman*, 1 Root, 528; *Jones' devisees v. Carter*, 4 Hen. & Mun. 184. In these numerous cases, and those cited in them, will be found all the law of much importance relating to the indefinite words, *by estimation*, and *more or less*. They never have been reduced to any precise meaning.

Sugden, 231.

6 Ves. jr. 338.  
—2 Munf.  
179.—Hall's  
case, 1  
Munf. 336.—  
Winch v.  
Winchester,  
1 Ves. &  
Beam. 375.—  
Day v. Fynn,  
Owen, 133.

§ 7. If a man purchase an estate by a particular and in the conveyance if a part of the land be left out, equity will relieve. *Tothil*, 83; *Finch*, 80.

See *Nelson v. Nelson*,  
*Nelson's Ch.*  
*R. 7.*

§ 8. If lands be shown to one as a part of his purchase, he will be entitled to them, though expressly excepted in the conveyance by name, if the buyer do not know them by that name. See *Ch. 101*, a. 5, s. 27; *Ch. 89*.

*Oxwich v.*  
*Brockett*, 1  
*Eq. Ca. Abr.*  
355, pl. 5.

§ 9. Defects in titles. All other objections removed it is extremely clear that equity will never enforce a specific performance, except where the vendor can convey a perfect title in law and equity. See 18 Ves. 555; *Dougl.* 421; 3 Taun. 433; 4 Desaus. Ch. R. 133; 17 Ves. jun. 80. And if to such title a third person's consent be necessary, the seller must procure it. 5 Taun. 249; 7 Taun. 9. Also it is to be observed, that a decree in equity acts *in personam*, and not as a judgment does *in rem*. And it is possible that a court of chancery never will be able to compel the person seized of the legal estate to convey it to the purchaser, as the person so seized may elect to live and die in jail; another reason for saying the notion is ill founded which makes the estate the purchaser's to all intents in equity as soon as it is contracted for, and before it is conveyed. On sound principles the estate ought not to

*Sugden's*  
*Ven.* 237 to  
273.

10 East. 248.  
—9 Ves. jr.  
368, *Drewe v*  
*Corp.*—16  
*Ves. jr.* 390.



CH. 226. be deemed the purchaser's till there is a moral certainty it will  
 Art. 1. be conveyed to him with a clear title.—Would be still better if  
 not till actually conveyed.

Yelv. 42.—  
 See Ch. 65, a.  
 8, s. 9.

§ 10. The judges of the common law do not take notice of the course and usage in chancery. The case seems only to prove the said judges will adhere to their own practice; as not to issue a *capias* on a recognisance, though chancery has a different practice.

## CHAPTER CCXXVI.

### PLEADINGS IN EQUITY.

#### ART. 1. *Pleadings in equity—general principles.*

§ 1. A summary sketch of pleadings in equity remains to be considered; a general view in this article, and more in detail, with the authorities, in the following ones. It is no doubt true, that pleadings in equity are much less intricate, much less technical, and much less extended than in courts of law; and may well be divided into much fewer branches or parts. Still, however, pleadings in equity have become to be of importance,—proceedings therein now are not without form or rules, as proceedings before referees are. Though in early times when most of the chancellors were clergymen, and the chancellor had his hearings at his house, and parties appeared before him without system or order to get his advice rather than decisions, no doubt the proceedings were without rule or precedent, but merely such as alone grew out of the case. But in course of several centuries forms and precedents in chancery have become material, and to be adhered to, except there be very special reasons for departing from them; and this in the natural order of things. There are usually doubts in most litigated cases, and in them it is altogether natural for lawyers and judges to have recourse to settled forms and established precedents in similar cases. Here turn to the synopsis of pleadings, as in Ch. 193, arts. 21 to 25, both included, containing a general sketch of pleadings in equity, especially the general principles on which proceedings in chancery and equity are found.

§ 2. It is a rule in equity, if the deft. duly served with process do not appear, the plt. may proceed *ex parte*. 1 Cranch, 17th rule of court.

§ 3. The United States are entitled in equity to preference in bankrupt cases. 5 Cranch, 289. CH. 226.  
Art. 2.

§ 4. Choses in action, viz. stock, debts, &c. cannot be touched in equity, are not liable to creditors,—not on a *levari facias*. 1 Ves. jr. 196. Nor can any criminal matters. Cooper's Pl. Dundas v. Dutens.

§ 5. There is no equity for a judgment creditor to have rents and profits of lands, where they are subject to prior judgments. Demurrer to the bill allowed. 1 Ves. jr. 463, 464,  
Cathcart v. Lewis.

§ 6. No bill of discovery lies on a legal title not established at law, denied by the deft's. answer. Such title is first to be settled. 2 Ves. jr. 129, n.

§ 7. This bill in equity was anciently a petition to the king, and is now, when the chancellor is a party, or when there is none, but the seal is in the king's own hands. Bills are of two kinds, original and not original. Cooper's Pl. 3.

ART. 2. *The bill of the plt. or complainant, in it several uses, authorities, &c.* This bill is of several kinds, as original, of revivor, of review, &c., lies in cases within 43 Eliz.

§ 1. The plt's. original bill must contain a full, fair, and accurate state of his case. And it is a fundamental principle, that in each case it contains sufficient grounds of equity to entitle him to the decree he prays for whenever the facts and matters in it are proved, otherwise the deft. may demur to it, because it does not contain sufficient grounds of equity, admitting the matters stated in it to be true. In actions at common law there are *formed* actions, as trespass, conspiracy, &c. in which a concise form of a declaration has been long established, and is purely technical. It is not so in equity; but every bill (plt's. declaration or complaint) must be special and circumstantial. 11 Ves. jun. 574; Cooper's Pl. 4. Dunstan v. Beauchamp,  
1 Ch. Ca. 193—Green v. Rutherford,  
1 Ves. 362.

§ 2. *The matter of the bill.* Where a bill lies; see sundry cases, American and English, in the preceding articles and the parts of this work therein referred to. Further, a bill lies to oblige one to discover things that make him a trespasser. 1 Eq. Ca. Abr. 76, ca. 5. As in entering a house and taking goods. Id. So to discover the owner of a wharf to enable the plt. to sue at law. 2 Vern. 442. So to discover the part owners of a ship. 2 Vern. 443. May be to discover one's personal estate after judgment and execution issued. 1 Vern. 106, 298. Assignee of a bankrupt dies, a new assignee may have his bill against his administrator for an account. 2 P. W. 546. Lies to establish a custom, though not for a satisfaction where the thing sounds in damages. 2 Eq. Ca. Abr. 163, ca. 23. Lies to compel the specific performance of an award to convey lands by a party paid for them. 3 P. W. 187. Cooper's Pl. 5, 6.

**CH. 226.** Lies to stop a prosecution at law for a fraud, as it is cognizable in equity as well as at law. 3 P. W. 277, 279. Lies for a creditor for relief against executors. 2 Eq. Ca. Abr. 163, ca. 29.

**Art. 2.**



Lies for a surety to compel the obligor to pay the debt, though the surety is not sued. 1 Vern. 190. To prevent an executor wasting the assets, decreed to give security.

1 Ch. Ca. 121. Lies to compel the tenant for life to pay a rent charge, that it may not all fall on him in remainder. 1 Ch. Ca. 223.

Lies to oblige one commoner to accept such damages as another recovered. 1 Vern. 308. Lies to discover by what means an after will was obtained, plt. having a former one in his favour not proved. 8 Vin. Abr. 548. A bill lies to put out a legacy to the wife to her use. 1 Stra. 503.

Lies to aid a defective conveyance to a legal charitable use.

1 W. Bl. 91. If the executor has no assets a bill lies against devisees and legatees in equity. Where a bill lies for discovery of land bought, see *Pendleton v. Wambursie*. Equity

**Johns. Ch. R.**

aids a judgment creditor after execution sued at law, by compelling a discovery and account against a debtor or third person possessing his property and placed beyond the reach of legal process.

§ 3. A bill lies in usury cases only on requiring the true debt to be paid or tendered. *Johns. Ch. R.* 367. Lies in behalf of an infant *in ventre sa mere*. 1 Eq. Ca. Abr. 71, pl. 5. As to usury, *Cooper's Pl.* 204.

§ 4. *Bills quia timet*. Where A has goods and a liberty for his life, remainder to B, bill lies for B to have them or security. 1 Ch. R. 110. Lies for an apprentice out of his time, to compel his master to sue within a year, or to deliver up the bond and indentures. 1 Ch. Ca. 70. Lies to prevent executors, administrators, &c. from wasting the assets. 1 Ch. Ca. 121. To prevent a multiplicity of law suits. 1 Vern. 22. So to avoid a circuitry of action. Lies to ascertain the bounds of land by commission, after the right is established at law. 2 Eq. Ca. Abr. 163, pl. 21. Lies to be quieted in the possession of a common, but not of a ferry or highway. 4 Vin. Abr. 425, pl. 35.

**9 Cranch, 19.**

A bill in equity to enjoin a judgment at law is not to be considered as an original bill; nor can a plt. in equity have a decree for more than he sues for in his bill; and it must state his case with certainty, yet succinctly as to all material circumstances of time, place, manner &c. *Cooper's Pl.* 5; 8 *Vesey jun.* 398; 1 *Vesey jun.* 287, 290, *East India Comp. v. Henchman*.

**9 Ves. jr. 398.**

**—1 Ves. jr.**

**287, 290.—2**

**Vesey jr. 323.**

§ 5. *As to form of the bill &c.* If for an account of fees &c. and to establish a right, plt. must in his bill shew how his right

*Cooper's Pl.* 2 to 20,—*Redesdale's Tr. Ch.*

vested. Bunb. 95. Suggestion the plt. has no remedy at law, though usual is not necessary :—rules &c. Plt. states in his bill his seizin for life *or* in tail &c. in the disjunctive ; deft. may take it either way. 1 Vern. 219. If the bill contain matter criminal or scandalous, it is expunged and costs paid. Rules &c. in Ch. 94 ; 2 Vesey, 24. None is deft., merely to pray for costs. 2 Vesey, 281. One has a bill in his own name and one in his assignee's. 1 Vesey, 544 ; 3 Atk. 602. A bill may have two different aspects, so that if the plt. fail as to one, he may prevail as to the other. 2 Atk. 324. And it will be observed, that in several cases before stated, American and English, the plt. in his bill prayed for some specified object or objects, also for general relief. So two bills may be filed on one subpoena against the same deft. Prac. Reg. in Ch. 26. But two bills reported for the same cause, one must be dismissed. *Id.* If two bills be brought, one by some creditors for themselves and others, and the other by other creditors for the same purposes, the court allows both bills to proceed. 3 Atk. 602. But if relief be prayed for by the bill, and at the hearing given up, must be expressly waived on the record. 1 Vesey jun. 197. A bill praying general relief is sufficient. If general relief in one part of the bill and particular relief in the other, and that improper,—stands over to be amended, paying costs of the day. The court will not adopt a general rule to make all incumbrancers parties. 3 Vesey jun. 314. A bill prays for general relief, plt. may at the bar pray for particular relief. 2 Atk. 141.

CH. 226.  
Art. 2.

Cook v. Martyn, 2 Atk. 2.

§ 6. The plt.'s bill prayed relief in the general execution of a trust, and demanded £6000, his wife's portion. Relief decreed was; that deft. levy a fine according to his father's covenant so to do, (among other things,) and though the plt. had a good remedy at law on a covenant to pay £6000, and to levy a fine to secure it ; also in this case, there was a material legal question if there was a covenant to levy a fine, and this question chancery decided. 2 Mod. 86, 92, *Hollis v Carr.*

§ 7. The heir at law brings his bill for a discovery and delivering up, or depositing title deeds, against executors &c., possessing them and the premises by agreement with a tenant by the curtesy, plt. need not state every link of his pedigree in his bill. 1 Ves. jr. 73, 78, *Ford v. Peering.*

§ 8. *Amending a bill.* This is almost of course in equity, paying costs. Motion of course after plea or demurrer to amend the bill on 20s. costs, must state the plea or demurrer is not set down for argument ; after set down, full costs. If the plt. do not appear, plea allowed of course. After an answer the plt. may always amend on paying 20s. costs. 1 Atk. 396. After publication plt. cannot amend without withdrawing his replication. 1 Atk. 51.

1 Ves. jr. 447, *Jennings v. Pierce.*

Сн. 226. § 9. A bill amended after answer, paying costs, is viewed as an original bill, and the plt. is not bound by offers in the former bill, nor the deft. by submissions in his answer; but matter subsequent to the original bill comes by way of supplemental bill, and not by amendment. 1 Atk. 291.

Art. 2.  
1 Ves. jr. 210,  
213.

1 Ves. jr. 405. § 10. A new plt. by supplementary bill may impeach a decree on rehearing on petition of former parties. All amendments moved must be properly stated. 1 Vesey jun. 388. Subpoena not necessary to an amended bill. 4 Ves. jun. 66.

§ 11. *Certainty in the bill.* Even at law it is good pleading to state facts correctly. It is more so in equity, as in this there is but very little technical pleading. The first rule is to state and plead facts and matters, so as to lay a ground for the decree the plt. prays for: 2. Rule, so to plead as that the court will readily and clearly understand the pleader's case: 3. And so as that the other party can readily know how to answer, defend, &c.

1 Ves. jr. 284,  
Hilton v.  
Barrow, 267,  
287.—1 Ves.  
jr. 449.—  
Cooper's Pl.  
4, 8.

§ 12. "The true way of pleading is to plead facts." If the vendor bring a bill for the specific performance of an agreement; if the deft. rely on the plt's. want of title, he must rest on his answer and not file a cross bill. A bill bad on demurrer, because it did not well connect the fraud with the transaction. So where the deft. so mentioned mortgagees that the plt. could not amend. So a general charge of a combination to defraud is too loose. A bill to perpetuate testimony to a right of common and of way is uncertain, because charged so generally the deft. cannot know the point to be examined. Demurrer to it allowed. But there is not in pleading in equity that decisive certainty required at law. Hence a bill may be framed in the disjunctive, and with two different aspects, so that if decided against the plt. in one, he may be aided in the other.

§ 13. *The matter of the bill.* Where it lies not. Sundry cases, American and English, in the preceding articles, and further.—Lies not to oblige one to discover what may subject him to a penal statute. 1 Vern. 109. *Nemo tenetur seipsum accusare.* Id. Not to discover who is tenant of the freehold, in order to sue a formedon. Held, on demurrer. 1 Vern. 212. But Cary 22. Nor tenant to the præcipe on a voluntary conveyance. 1 Vern. 213, 273. Not a matter that subjects one to forfeiture of estate. 2 Ch. R. 86. Not to oblige the husband to discover ill usage to his wife. 1 Vern. 254. Not to compel one to a specific performance of a contract to deliver corn. 2 Eq. Ca. Abr. 160, ca. 6. Nor to transfer stock. Ib. ca. 8. Not to compel trustees to enter to preserve contingent remainders, as their title is at law. Though one in remainder may bring his bill to compel deeds &c. to be brought into court. 9 Mod.

128, 132. Lies not to compel the performance of a contract to pay money, consideration of having stifled a prosecution for felony. 3 P. W. 277.—Lies not to discover criminal acts; 8 Vin. Abr. 543; nor to subject the deft. to a forfeiture as for waste. 2 Eq. Ca. Abr. 378, ca. 9. Plt. not entitled to a discovery without verifying his title at law. 8 Vin. Abr. 538.—Lies not to relieve in case of non-performance of a condition precedent. 1 Salk. 231. As to a parol agreement, Ch. 11, a. 1, s. 2. Bill of discovery and injunction, Ch. 115, a. 4, s. 33; Ch. 9, a. 18, s. 19. Where a bill lies not to enforce a judgment at law, see *Skillern v. May*, 4 Cran. 137. Equity will not decree a mere legal title proper for ejectment, even on a cross bill, where the original bill is dismissed. 1 Vesey jun. 213. But no costs for deft. Id. And if the plt. in his bill claims any relief, he is not entitled to it or any discovery. The deft. may demur to his bill. Cooper's Pl. 110 &c. 181 &c.

Ch. 226.

Art. 2.

As to *certiorari*, and bills to remove causes from inferior courts that cannot properly consider them, see Cooper's Pl. 49, 50. As to the matter of a bill either for relief or discovery, or both, it is clear, it is often multifarious; and particularly so as the plt. in his bill is allowed, by long settled practice, to anticipate the deft's. defence. For instance, his plea of the statute of frauds and perjuries; the plt. expecting this plea, attempts in his bill to obviate its effect; as in his bill for a specific performance of a parol contract as to lands, he states a part performance of it—what in correct pleadings he would only reply;—thus blending in his bill the proper matter of it; also the proper matters of a replication. So the plt. anticipating the deft. will plead, in bar of the plt's. bill, the statute of limitations, he states in it an acknowledgment, or a renewed promise within six years. So anticipating, the deft. will in his plea deny he has any interest in the subject matter of the bill, (being only a mere witness,) the plt. states in his bill and charges interest in the deft. And matter thus by anticipation stated in the bill is viewed in equity as true, if not fully denied by the deft. and usually draws from him both a plea and an answer. His plea putting in issue a single point, and his answer supporting his plea. For instance, the plt. in his bill charges interest in the deft., the deft's. plea must, by averment, meet the charge of interest; and the plea must also be supported by an answer denying such claim or charge,—as also stated, a. 6, s. 22. Without such statement the bill would be bad on demurrer, as it would not state any interest in the deft. to make him a party; or would only state a parol contract as to lands, or a promise above six years old &c. The plt. aware of this adds, as above; in which case the deft. cannot demur, but must plead and answer, so as to get the true and material facts of the case fairly in trial before the court.

CH. 226.

Art. 2.

2 Com. D.  
Ch. E. 2, if  
not, others  
added on mo-  
tion.—Coo-  
per's Pl. 20  
to 42, 288,  
289.—3 Hen.  
& M. 316,  
Hoover v.  
Donally & al.

§ 14. *Parties to the bill.* All concerned in the demand ought to be made parties. Hence if the bill be against the executor of one obligor for discovery of assets, all the obligors must be joined. 2 Vent. 348. But those only are parties against whom process is prayed. 1 P. W. 593. Regularly, want of parties ought to be objected on opening the cause: but it is often necessary to let them in after the cause is fully heard. 3 Atk. 111. But if creditors or legatees bring a bill against an executor, a residuary legatee need not be a party. 1 Brown, Ch. R. 303. But joint and several debtors must be joined, 3 Atk. 406. But a principal cannot object, his surety is not joined; nor need be, a representative of a surety deceased insolvent. Id. Nor need the attorney general be in cases of private charities. 3 Atk. 277; Bunb. 291; Stra. 95; Hard. 181, 333; Ca. Ch. 153, 277, in public.

Bill to redeem, the heir and executor or administrator must be a party. 2 Eq. Ca. Abr. 165, c. 2. A *cestui que trust* must, in all cases, be a party, but not the trustee. Pr. Ch. 175. Executors of lessee bound to repair must be parties, though he died insolvent. Bill amended, 2 Eq. Ca. Abr. 165, ca. 6. A, B, and C, are jointly and severally bound, B died, a bill against his executors alone. 2 Will. R. 313. A power and no estate being devised to executors they need not be parties. 2 Will. R. 308. Lands devised to pay debts, creditors bring a bill to compel a sale—heir must be a party. *Secus* of a trust created by deed. 3 Will. R. 91. If a bill be against a trustee for an account, all the *cestui que trusts* must be pls. 1 Vern. 110. To a bill to establish a custom the owner of the inheritance must be a party. Bunb. 181. A tradesman is employed by a committee of a voluntary society; a bill against them is sufficient, omitting the other members. 1 Brown, Ch. R. 101. Three mortgagees, joint tenants, all must join to foreclose. 368; Atk. 237; 2 Vesey, 431, 491. On a bill for account of fees to establish a right, all persons having any pretence to right must be parties, as all will be bound by the decree; though at law a judgment for fees does not bind a third party. 2 Atk. 296, 515. In a suit for a legacy the executor is a sufficient party. 1 Vesey, 129, 444. Husband tenant for life, remainder to his wife for life, he brings a bill to know if certain lands were included in the settlement, she must be a party. 1 Atk. 290. If an heir bring a bill for discovery of the money of A, with which a trustee purchased an estate, A's executor must be a party. Ch. R. 4, 5. Bill against *baron and feme* abated by his death. 3 Salk. 84. One lessee alone cannot have apportionment. 1 Stra. 95. Bill for a charitable use, all the tenants need not be parties. 1 Salk. 162. Want of proper parties is not cause to dismiss the bill;

3 Cran. 220; but may be added on motion. Com. D. Ch. E 2. CH. 226.  
Two lessees must join for appointment; and if one will not, is Art. 2.  
made deft. Stra. 95. Assignee of a legacy sues, executor must be a party. Ca. Ch. 277. Second mortgagee brings a bill to redeem against the first, the mortgagor or his heir must be a party. 2 Brown Ch. R. 276; 2 Atk. 237; 2 Vesey, 431, 491. Bill by assignee of a judgment, assignor must be a party. 1 Vesey jun. 463; Cooper's Pl. 37, cited.

§ 15. A crew of 80 appoint two of their number prize agents, and afterwards 64 of them claim, the agents have certain shares, the 80 must be parties to a bill; if not it may be demurred to. 2 Vesey, 312. In a bill for discovery of assets, administrator must be a party deft. 2 Atk. 51. Corporations and all persons of full age not labouring under any special incapacity may sue and be sued in chancery. So a feme covert if her husband be banished, or has abjured the realm, or is an alien enemy. Cooper's Pl. 23. A foreign sovereign may sue in equity, 24; but not if not acknowledged by the executive government. 24. Aliens may be parties or not in equity as at law. 24. See Ch. 3. One outlawed, attainted, or a bankrupt cannot. 25, 26. But persons made defts. in chancery cannot plead their own disabilities. 26, 294.

§ 16. Infants and idiots and lunatics generally sue and defend in equity as at law, aided by others, as stated in Ch. 35, Cooper's Pl. 25, 28. And a bill may be filed in behalf of a child in *ventre sa mere*, and an injunction may issue to prevent waste in its estate. 29. Also a wife in several cases may sue in equity by her next friend, as where in opposition to her husband's interest, but her consent to the bill is necessary. 29. But by order of the court she may defend alone, or without such order, where her husband makes her a deft.; for then he treats her as a feme sole. 30. And see Ch. 19, as to marital rights.

§ 17. Cooper in his pleadings in equity, speaking of parties, truly observes, that is a very difficult part in these pleadings, to have the right parties to them; and that it is a general rule, "that however numerous the persons may be who are interested in the subject of the suit, they must nevertheless be all made parties, plts. or defts, so that a complete decree may be made between those parties, it being the constant aim of a court of equity to do complete justice, by embracing the whole subject, deciding upon and settling the rights of all persons interested in the subject of the suit, to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation." If this be not done the bill is open to objections at the hearing, or to demurrer. This is the general rule, but it has its exceptions, as already

Alien enemies cannot be plts. even for a discovery, Cooper's Pl. 293.

P. 20 to 42.—  
P. 184, 186,  
&c.

Cites Redesdale, Tr Ch. Pl. 45, 12.



CH. 226.  
Art. 2.



appears in several cases. And in fixing parties, beneficial, as well as legal, interest must be considered as settled in the result or decree; hence every trustee, or each one in his place, must be a party. 1 Eq. Ca. Abr. 72. But this rule may be dispensed with, if any of them be not amenable to the court, and the fact appears. Id; and *Préc. in Ch.* 63; 2 Vern. 380; 2 Atk. 510. So it seems to be sufficient to make all interested parties to the bill as far as to include the first tenants in tail in existence; therefore a remainderman expectant upon the estate tail need not be a party. Cooper's Pl. 35, 36, 185. And if no tenant in tail in existence the first person entitled to the inheritance must be a party, and when none such, the tenant for life. Id. And generally one need not be a party, where he cannot be bound by the decree, when a party; nor if it be intended it shall not bind him, and not operate on him in its execution. 1 P. W. 100; 2 Atk. 125; 3 P. W. 91, 331. Parties improperly joined or not, Cooper's Pl. 181, 182; 2 Vesey jun. 487.

§ 18. So when the persons having a like interest are very numerous, a part of them only may sue, of necessity. As if many creditors seek an account of the estate of a deceased debtor for paying their debts, a few of them may sue in behalf of all; and the other creditors may come in under the decree. Cooper's Pl. 39, 185, 186, cites 2 Vesey, 312. So a legatee having a distinct legacy; and one entitled to a distributive share may sue alone. Id.; other cases, 40, and cases cited. But if a bill be multifarious, the debt. may demur to it as bad in form. Several plts. cannot demand in one bill several distinct matters against one debt.; nor one plt. demand several matters of distinct nature against several debts. Cooper's Pl. 181, 182. As if an estate be sold in lots to several purchasers, they cannot join in one bill against the vendor for a specific performance, as each one's case is distinct.

§ 19. A bill to perpetuate testimony. This is a species of original bill. Its object is to preserve the testimony of witnesses, to be used in the proper courts, as well to be used in future suits as to prevent litigation. The principle of this bill ought to be practised upon in every good system of jurisprudence; and we find such a bill was in use among the Romans. It has often happened that one has foreseen proof by witnesses would become necessary, probably after their death, and would be lost, to his disadvantage, if not preserved in this way; hence he prays in his bill for leave to examine witnesses in order to perpetuate their testimony. This bill must state the subject matter as to which his evidence is to be preserved; and he must show he has some interest in this subject, and that he may suffer by the loss of the testimony. But any vested interest is suffi-

1 Eq. Ca.  
Abr. 233, 234.  
—2 Do. 166.  
—1 Vern.  
106, 185, 308,  
354, 361, 452.  
—Cooper's  
Pl. 51, 56.—  
1 Salk. 278.  
—Cro. El.  
352.—6 Vesey  
jr. 260, 261.

cient, as in remainder or reversion after an estate for life ; but a mere possibility is not ; nor is an interest the deft. may irremediably bar by a recovery or otherwise ; nor any expectation, as of an heir living his ancestor, or of a devisee living the testator. Any sort of existing right which the law allows to be an interest, even a contingent interest, is a good ground of this bill ; and if the plt. have but an expectation, as an heir apparent, and so far no ground, yet he may make a contract respecting his expectation and possibility, which contract may be sufficient. So the plt. cannot have this bill when he has a right to sue and settle his title, as where not in possession and has a right to sue, as then he ought to assert his right. But when in possession he cannot sue to recover, and so has no opportunity to examine his witnesses at law, though he expects a future contest. Therefore decided that one in actual possession of a fishery might bring this bill ; but otherwise if not so in possession. *Cooper's Pl. 54.* And then the plt's. bill must well describe the rights as to which the evidence is to be taken, and the parties concerned, and state and shew some existing interest in those he makes defts. 1. They ought to know to what right and parties the plt. proceeds, and 2. In a future trial of his right it must clearly appear that the testimony he preserves relates to that right ; as it is clear that the plt. cannot preserve evidence as to one point or subject, and in an after suit apply it to another. And if the matter be charged too generally, the deft. may demur to the plt's. bill. As where he brought one to perpetuate the testimony of witnesses to a right of common and of way. The plts. claimed as lessees of a manor under A, and the bill charged, that the "tenants, owners, and occupiers of the said lands, messuages, tenements, and hereditaments, in right thereof or otherwise, have had from the time whereof the memory &c. have, and of right ought to have, common of pasture for their horses, sheep, and other cattle, in a certain waste, called Brown Clee Hill, &c." Like charge of a right of way. The bill also charged that the plts. were in quiet possession ; but the deft. threatened them with actions, when their witnesses should be dead. Demurrer to this bill, four causes : 1. That the plts. had no equity : 2. No legal right of common was stated in any one : 3. Several plts. having distinct interests were joined in the same bill : 4. Not stated as to what messuages in particular the rights of common and way were claimed. Demurrer allowed, because the charge was too general ; because by the words, *or otherwise*, the plt. was at liberty to prove any right. The chancellor said, "special pleading depends upon the good sense of the thing ; and so does pleading here." Here "there must be something substantial." "The party must claim something ;"

CH. 226.

Art. 2.

Pr. Ch. 531.—  
1 Vern. 308.1 Vesey, jr.  
449, 450,  
Cresset v.  
Mitton.—1  
Vern. 312.—  
6 Vesey jr.  
251.—Coop-  
er's Pl. 54.

CH. 226. "and the deft. ought to know to what the plt. points his commission." So the children of a first marriage may have this bill to perpetuate evidence of it, against children of a second marriage. 6 Vesey jun. 251. The bill must state the situation of the witnesses. 1 Eq. Ca. Abr. 234.

Art. 3.

§ 20. A bill to examine witnesses *de bene esse*. This is like the other in most respects; but differs in one: that is, by a plt. in possession; this by one out of possession, and having witnesses infirm or aged, or a single witness, and in aid of his trial at law. 6 Vesey jun. 251. Plt. must make affidavit of the fact shewing how he is in danger of losing his evidence, as by the death of his witnesses, or their leaving the country. 1 P. W. 117; Ambl. 65; 3 P. W. 78; 1 Eq. Ca. Abr. 233, 234; 1 Vern. 441; 2 Vern. 159; Hard. 332.

Cooper's Pl.  
57 to 61, 187,  
209, 289, 301.

§ 21. Bills of discovery, a third species of original bills, not praying relief, by which a suit may be commenced in a court of equity. "Every bill, except the bill of *certiorari*, may, in truth, be considered as a bill of discovery, for every bill seeks a disclosure of circumstances relative to the plt's. case." Cooper's Pl. 57. But strictly this bill of discovery is to discover facts resting in the deft's. knowledge, or of deeds or writings, or other things in his custody or power, and seeking no relief in consequence of the discovery; and if a plt. be entitled not to relief, but to a discovery, and he prays relief also, his bill is bad on demurrer. But where the plt. in his bill for a discovery may go on for general relief, and an injunction, see *Brandon v. Sands*, a. 5, s. 6. General rule is, the plt. shall have a discovery only of what relates to his own title, as of deeds he claims under, "and not pry into that of the defts." Cooper's Pl. 58 cites 2 Vesey, 445, and several cases. See art. 16.

4 Vesey jr.  
66, 72.—6  
Vesey jr. 291.

ART. 3. *Process—to bring in the deft. to answer &c.*

See Ch. 193,  
a. 23, s. 10  
&c.

§ 1. Several cases of process in chancery may be seen in Ch. 193, a. 21 &c.; Ch. 220; Ch. 225; and in the several parts of this chapter. Whatever may have been the practice, to issue a subpoena or attachment to bring the deft. into court, before the plt. has filed his bill, at least in substance, it has been a bad practice; as till this is filed it is impossible for the court to know on what ground to proceed. The deft. is brought in to answer to something in *nubibus*, and to no purpose, if death or other cause prevents the plt's. original bill being filed. On this principle is the 4 & 5 Anne, c. 16.

1 Cranch,  
rules &c.

§ 2. In England and in the United States, the practice has been for a court of equity to direct its process where there is no statute provision. The Supreme Court of the United States as early as A. D. 1796, by a rule of court, accordingly ordered, "that process of subpoena issuing out of this court in any suit in equity, shall be served on the defendant sixty days

before the return day of the said process ; and further, that if the deft. on such service of the subpoena, shall not appear at the return day therein, the complainant shall be at liberty to proceed *ex parte*." This rule seems to make the attachment for contempt in not appearing unnecessary. A subpoena seems to be the first process in England, disobedience to which, when duly served, is viewed as a contempt of court, and an attachment of contempt issues, as stated Ch. 220, art. 4 & 5 ; and this often followed by a sequestration. This attachment there, is attended with many doubts and difficulties. So is sequestration. See 2 Com. D. Chancery D. 1 &c. ; 1 Eq. Ca. Abr. word, Process.

CH. 226.  
Art. 3.

§ 3. The above rule does not direct *how* the subpoena shall be served. If the manner of serving it be settled in a State, this may in it be adopted ; if not settled, perhaps the best rule is to have it served as an original summons is, by the officer's giving the party, or leaving for him, at his place of abode, an attested copy.

§ 4. If there be several defts. in a suit, not a corporation, it is conceived, the subpoena must be served on each within the reach of the court's process, a *feme covert* excepted. Where served on her husband with notice, his wife is a party with him.

It will be observed, that the rule cited above only waives the deft's. contempt in not appearing in court ; but leaves all other misconduct, as to the subpoena, amounting to a contempt of court, where it has been in practice in England, and in some of our States ; as the improper, or contemptuous treatment of the court, in relation to the subpoena, by abusive language, or misconduct of those who serve it.

§ 5. The subpoena is served in England in many ways not applicable here, and in ways that vary there. And if a deft. be out of the reach of the court's process, it cannot be legally served by a service on another, but by statute, or at least a standing public rule of the court ; as by the rules and orders in Chancery, and stat. 5 Geo. II. c. 25, providing for notice to an absconding deft., taking the plt's bill *pro confesso*, and to pay his demand, a sequestration of the deft's. real and personal estate, or so much thereof as may be necessary. 2 Ves. jun. 188 &c. ; 2 Atk. 114.

§ 6. For every contempt in relation to this subpoena, as for other contempts, lies the process of contempt, as stated Ch. 193, a. 21 &c. ; and especially a. 28 ; and Ch. 220, a. 4, a. 5 ; and this is usually the attachment of contempt. 1 Ch. C. 238 ; 1 Vern. 172 ; 2 Vern. 369.

§ 7. *Attachment.* This the plt. cannot have without clear evidence of the deft's. contempt, as it is to deprive the sub-

CH. 226. ject or citizen, for a time at least, of his personal liberty, to punish him with imprisonment, &c. Hence the affidavits, stating the facts on which the attachment issues, must be positive and certain, or such facts must be confessed, or within the court's view. It lies for any contempt, well proved, and even for answering insufficiently, or if the husband, by menaces, makes his wife answer contrary to her belief. 2 Atk. 50. Or if a party refuse to obey an order or decree, or for debt or costs, or both decreed. 2 Anstr. 380, 413; 3 Vesey jun. 471. For any act in contravention of a decree, by one who hears it pronounced. 3 Atk. 564, 567. For disobeying an award made by rule of court. For ill treating him who serves the subpoena. The deft. may be examined on interrogatories, and if to matter not in the order or affidavit, he may demur, and refuse to answer; rules &c. in Ch. 114; and if no contempt proved, is discharged, with costs. As to a libel, chancery has cognizance of it only when a contempt of court. 2 Atk. 469. In this case three sorts of contempts are stated: 1. Scandalizing the court itself: 2. Abusing parties in the cause: 3. Prejudicing mankind before the cause is heard, as by printed statements &c. So 2 Vesey, 520; 2 Atk. 488, 507.

Read v. Hug-  
ginson.

None are parties to the bill, though named in it, but those against whom process issues,—Cooper's Pl. 16,—which is a subpoena to individuals, and a writ of distringas to corporations aggregate, which answer under the common seal. But sometimes the court will order their principal officers or members to answer on oath. Id.; and cites 1 Vern. 117; 14 Vesey, 245.

#### ART. 4. *Pleas in abatement and amendments.*

§ 1. Pleas in abatement are not common in equity, for several reasons. The following among others: 1. The rigid practice in pleadings in courts of law, are not much regarded in courts of equity: 2. This court allows amendments very liberally: 3. If any person or persons refuse to be plts. who ought to be, he or they may be made deft. or defts.: 4. In almost any stages in the suit before a final decree is made, new parties may be inserted in the suit by amendment, or a further bill or bills: 5. If a party die, *pendente lite*, plt. or deft. the suit does not abate, unless such party is so far a material party, and concerned in interest, as to make it necessary to have representatives before the court, before there can be a final decision of the cause: and 6. Practice in equity is very liberal in letting in such to be parties in the suit. These principles will appear in the cases more in detail in this and the next preceding chapters, and other parts of this work. The few pleas in abatement are mainly for want of parties.

§ 2. *Cases.* At law if the deft. plead in abatement the want or omission of parties, he must shew who they are, in order to give the plt. a better writ. Moseley, 207. But in equity if there be such a plea, the bill may be dismissed, but most generally is amended, and the omitted party added by some proceeding well understood in chancery; and if thereby a party be added, process must be prayed against it. Also 1 Will. R. 593; Stra. 95. If a *feme sole* deft. marry, pending the suit, it is not abated; *secus*, if a *feme sole* plt. so marry. 2 Eq. Ca. Abr. 1. If two joint tenants bring a bill, and one releases, the suit is not abated. 2 Freem. R. 6. But though the attorney general joins in the bill, the relator's death abates it, as he is a material party. Preced. in Ch. 13. If baron and feme sue in equity for what they have a joint right to, the death of either abates not the suit. 1 Eq. Ca. Abr. 1; 3 Ch. R. 40; 2 Vern. 249. Nor does the plt's. death, after a bill of *interpleader* is filed, abate the suit. As where a trial at law is directed to settle the matter between the defts., the suit is at an end as to the plt. 1 Vern. 351. If husband and wife have a promise made to them, and they bring a bill for performance, and pending it she dies, it does not abate, as the whole interest survives to him. Cary, 88. Nor if they sue in her right and he so dies. 3 Ch. R. 40. Nor if a bill be against them for a legacy, she executrix, and he so dies. 2 Vern. 249. Nor does the bill abate, if two joint tenants sue it, and pending it one dies. 3 Ch. R. 66. The *cestui que trust's* death abates the suit as to him; yet if there be a decree against him and his trustees to convey &c., they must do it, for the death of either party abates, only *quoad* him. 1 Eq. Ca. Abr. 2, c. 7. And the court held, generally in this case, (Winchelsea case,) that if there be several plts. or defts., and any of them die, the suit abates but as to such, and goes on as to those alive, especially if nothing is to be done by the deceased or their representatives. But if the plts. should afterwards desire a conveyance of the equitable interest, they must revive against the heirs of the *cestui que trust*. "And so in all cases where any thing was required to to be done by the representatives of the party dying." Also held, if some of the plt's refuse to join in a bill of revivor, the others may alone sue it, and make those refusing, defts. Also held, the deft. may bring a bill of revivor as well as the plt. Also held, money may be ordered out of court to the party entitled to it by the decree, notwithstanding the death of some of the parties. Several pleas to the person, Cooper's Pl. 242 to 250.

As to several matters pleadable in abatement, see Synopsis, Ch. 193, a. 22, as to the jurisdiction, alien enemy, outlawry, &c.

CH. 226.  
Art. 4.

CH. 226.

Art. 5.

§ 3. If the plea be in abatement, and disallowed, is a *respondens ouster*. 1 Vern. 73. Nor is a dilatory plea allowed when the deft. is in contempt, or answers by commission.

Plt. entitled himself as administrator;—plea, not administrator. Held, a good plea. 1 Vern. 473. Good in abatement at law.

§ 4. See several of the above, and other cases in abatement. Cooper's Pl. 62 to 73;—also 106, 192. As to pleas, to the jurisdiction of the court, see art. 5, s. 29, demurrers to the jurisdiction. The only material difference is in getting the facts into the case, on which exceptions to the jurisdiction are taken. If they appear in the bill, deft. may demur, if not, he, by his plea, must work them into the case, and so lay them before the court. Several cases, Cooper's Pl. 237, 241. A plea, alleging the plt's. disability to sue &c. is said to be in the nature of a plea in abatement.

1 Eq. Ca.  
Abr. 29, 30.  
—2 Vern.  
472, 602.—  
2 Will. R.  
646.—Bunb.  
295.—2 Will.  
R. 424.—  
Bunb. 246.—  
2 Freem. R.  
39.—2 Will.  
R. 300.—1  
Will. R. 428.  
—Cooper's  
Pl. 233, 332  
to 339.

§ 5. *Amendments*. These prevent many pleas in abatement. Bill may be amended where proper parties are not made defts. to the suit. 3 Ch. Ca. 92. So answers may be amended. If there be a mistake in the bill requiring amendment before the deft. appears, it may be amended on motion, without costs; but if after he appears, costs must be paid. Costs on a demurrer, put in for a slip or mistake, are 20s., which being paid, the party may amend without motion; but if any new matter arise after the cause is at issue, necessary for the plt. to state, this is done by filing a supplemental bill, which the court will admit, and on affidavit of such new matter. Bill amended by adding several tenants of a manor, some as plts. and some as defts., in order to establish a custom. 1 Ch. Ca. 29. A conveyance stated in a bill without date, amended. Deft. may amend his answer in a small matter, without notice, but in a material point he must give notice of the motion for such amendment; and though in a material point, and after issue joined, yet the court will, on affidavit of surprise, and paying costs, allow an amendment. The deft., by her answer, consented an award made by her father might be confirmed; court refused leave to amend in this respect, though she made oath she never read the award &c. 2 Vern. 434. An order amended by adding, "*and wife*," though bad at law. 3 Vern. 376. Plea amended.

ART. 5. *Demurrer to the plt's. bill*.

§ 1. Principles of demurrer briefly stated, Ch. 193, a. 22. Its object is to point out matters to shew the plt. ought not to have a decree,—only admits facts well pleaded, and these alone without the conclusion of law. The general intent of it is to deny the plt. can have a decree, because his bill, if true, does not contain sufficient equity to entitle him to it; but the de-

Mitford's  
Pleadings,  
14.—1 Ves.  
jr. 73.—3 P.  
W. 50.—1  
Ves. jr. 289.  
—2 Ves. jr.  
96, 323.—2  
Vesey jr. 27,  
450.—5 Mod. 132.

murrer confesses every thing well pleaded ; and a demurrer is clearly proper when taking the plt's. charges or facts in his bill to be true, it must be dismissed, as having no sufficient foundation in equity whereon to decree in his favour. And if the plt's. bill contain joint and separate demands, this is good cause of demurrer ; but not if the bill state a feoffment without alleging livery, because this is intended. Demurrer *demoratur*, will go no further. Co. L. 71. CH. 226.  
Art. 5.

§ 2. *The ground of a demurrer must be a short point &c.* As where the assignees of a bankrupt claimed on a bill a specific performance of an agreement to make leases &c. containing a great combination of circumstances. Defts. demurred generally. Demurrer overruled, though no perfect contract was stated by the bill, but the chancellor thought it not a point on this demurrer ; as that excluded all the evidence, on hearing which he might decree for or against the performance. If I understand this case, obscurity itself, the demurrer to the whole bill was deemed improper, because it precluded all the evidence which, when seen, might have thrown light upon a complicated case and enabled the chancellor to do better equity than on the demurrer. 3 Ves. jun.  
253, 256,  
Brooke v.  
Hewitt & al.  
Demurrers  
are general  
or special, as  
at law, Coop-  
er's Pl. 118.

§ 3. But a demurrer to the whole bill is correct, where it is clearly bad, and not so complicated. As where the plt's. bill stated generally, that under some deeds in the deft's. custody the plt. had a title to some interest in some estates in their possession, and prayed a discovery and delivery of the title-deeds, possession of the estates, and an account. Demurrer to the whole bill allowed. The demurrer alleged one cause, that was, that the plt's. bill did not shew "any sufficient matter of equity to entitle him to the relief thereby sought." Plts. had leave to amend, and in fact to make the bill more specific and certain ; the demurrer to the whole bill seems to have been allowed, because loose and vague it was impossible for the deft. to know to what they were to answer. Plea or answer overrules a demurrer. 3 Ves. jr. 343,  
347, Ryves v.  
Ryves & al.  
  
3 P. W. 19.

§ 4. A demurrer is bad if to the whole bill, for a cause stated, applying to but a part of it ; as if for want of affidavit, where the part of the bill seeking a discovery as to deeds did not need an affidavit, though the part of the bill which sought to perpetuate testimony did need an affidavit. 1 Johns. Ca.  
429.

§ 5. Exceptions to a master's report is as a special demurrer, and the objector must lay his finger on the very errors. 6 Johns. R.  
566, 599.

It is not a cause of demurrer to a bill for discovery of assets, that the plt. has a right of action. The discovery of assets, like a discovery of deeds and writings, may be a matter distinct from this right of action. 2 Cranch,  
406.



CH. 226. § 6. *Demurrer overruled.* Deft. pleaded a statute of limitations. As where the bankrupt lost money at play to the deft.; his right vested and passed to his assignees, who sued at law on the 9 Anne, within three months. Their bill prayed a discovery, and the production of the deft's. books and writings relating to matters in the bill, and an injunction from obtaining a judgment at law, as in case of a nonsuit, until answer,—and other general relief. Defs. demurred generally. The real objection was, that this right was not transmissible; and demurrer was correct, because the bill prayed for relief; but held the right transmissible. Demurrer overruled. Held also, the prayer was for general relief merely, not for the payment of the money; that the specific relief sought was the injunction, a mere consequence of the prayer for discovery. Then the defts. pleaded the limitation in said statute three months &c. Plea bad, as it coupled the commencement of the action and time of filing the bill. Deft. to pay all costs. See 3 Atk. 439.

2 Ves. jr. 514, Higgins v. Crawford, 441, 679. § 7. *Plea and answer both.* Bill for an annuity and account for arrears, against two administrators with the will annexed. One pleaded the act of limitations as to all accrued beyond six years, and by answer set up an agreement to relinquish the annuity. Plea overruled without prejudice to insisting on the same matter in the answer. Deft. waived his plea.

Cooper's Pl. 181, 182. § 8. Demurrer allowed to a bill praying the deft. might state particulars of his pedigree as heir, and of the births, baptisms, marriages, deaths, or burials. This prayer was in the pl't's. amended bill. The chancellor observed, this was a fishing bill to know how a man makes out his title as heir. Such fishing bills are become common in England.

1 Eq. Ca. Abr. 39, 43.—Bunb. 69.—1 Vern. 416. Monnins v. Monnins.—3 Atk. 387, 392.—2 Ves. 265.—Cooper's Pl. 296. § 9. It is cause of demurrer, if things of a distinct nature are joined in one bill against different defts. which require several answers and examinations. Hard. 337; 1 Vern. 416. Not if combination is charged. A bill may be demurred to, which seek a discovery that may cause a forfeiture of goods. As where goods were devised to the deft. as long as she remained a widow, and the bill prayed that she might discover if she were married; she demurred to it, as the discovery sought might make her forfeit the goods. Demurrer allowed, which assigned the cause. 2 Ch. R. 68. So if forfeiture is not waived. 1 Vesey, 56, 245; but 2 Ves. 450; 3 Atk. 260.

§ 10. It is cause of demurrer to a bill by a husband, that it seeks a discovery of hard usage of his wife. 1 Vern. 204. Not proper to demur to a bill for scandal, it ought to be expunged on reference. 1 Vern. 107.

§ 11. A deft. may plead to one part of a bill and demur to another, and answer to a third, but it is inconsistent to plead

and demur to one and the same part of the bill. 1 Eq. Ca. Ch. 226. Abr. 42, ca. 5. If the bill itself shew the plt. has no right, it is cause of demurrer. 1 Vern. 39. Arbitrators may demur, if made parties to the bill. 2 Vern. 380. No demurrer to a subpoena in the nature of a *scire facias*. 1 Ch. Ca. 50; Cooper's Pl. 112. *Art. 5.*

§ 12. *Def't. may demur because there is a remedy at law.* As if the bill be for the conveyance of a mere legal estate. 1 Brown. Ch. R. 313. As to a bill to be quieted in the possession of a fishery,—that ought first to be tried at law. 2 Atk. 483. As a bill for monies due for attorney's business. 3 Atk. 740. As where the plt. ought first to establish his right at law, in a case that may be a monopoly long and expensive. 2 Atk. 391. But if there has been possession of a fishery a long time, one claiming the sole right may bring a bill to be quieted in the possession, though he has not established his right at law; and no cause of demurrer that defts. have distinct rights, for on an issue to try the general right they may take advantage of them. 1 Atk. 282. Def't. may demur to a bill, if by it, it appears he had uninterrupted possession thirty-four years and no incapacity pretended. Bunb. 54. A demurrer must state the cause of demurrer, whether to the whole bill or to a part of it. Cooper's Pl. 112; 8 Vesey, 408; 2 Vesey, 241.

§ 13. *General rules as to demurrers.* Def't. cannot demur if in contempt; nor demur and plead, nor demur and answer, to the same part of a bill; for the plea or answer overrules the demurrer; 3 P. W. 79; and it is inconsistent, s. 11. If a demurrer be overruled the def't. may insist on the same thing in his answer. 2 Atk. 282. Length of time is not proper matter for a demurrer, but for a plea. 2 Vesey, 100; but see Bunb. 54, above. If the def't. answer to a part of the discovery, he cannot demur to the other part; but he may answer to the discovery and demur to the relief. 2 Atk. 157. But there cannot be a demurrer to a discovery without one to the relief, for that would be not to demur to the thing required, but to the means of obtaining it. 2 Brown, Ch. R. 121. If a bill proper for a discovery only, also prays relief, it may be generally demurred to. Id. 281. A demurrer bad in part is void for the whole. As if a trustee in a usurious bond be a def't. to a bill for a discovery, and to perpetuate testimony, and demur to both, it is bad; *secus* if only to the discovery. 1 Atk. 450. A demurrer for want of jurisdiction is bad; this should be pleaded. Id. 543. A demurrer cannot stand for an answer. 3 Atk. 530. Nor can any benefit of exception be saved on a demurrer. 2 Vesey, 109. The particulars demurred or pleaded to must be well distinguished. 2 Vesey, 450; but 2 Vesey

CH. 226. jun. 83. After time to plead,—may answer and demur, but  
 Art. 5. not to demur only. 3 Atk. 726. Demurrers ought to shew  
 the causes for which demurred ;—good general rule, but has  
 its exceptions. A deft. cannot demur *ore tenus*, unless he has  
 a demurrer on record. Cooper's Pl. 112. If several defts.  
 join in a demurrer it may good as to one, and not as to another.  
 Cooper's Pl. 113. And a demurrer to the whole bill, and  
 several causes assigned and one good will do,—Id.—though  
 the rest be bad.

§ 14. Deft. may demur, if the bill seek a discovery of a  
 title against a devisee, where the plt. shews no title in himself.  
 Ch. Ca. 36.

§ 15. Deft. may demur, if the plt. bring an original bill  
 where it ought to be a bill of review. Bunb. 56. Demurrers  
 to relief may be to the jurisdiction, the person, or to the sub-  
 stance or form of the bill. Cooper, 118.

§ 16. Demurrer may be to a bill, because below the dig-  
 nity of the court, as for a trifling sum, and no fraud and no  
 complicated matter in the case. Bunb. 17. And if the deft. do  
 not demur for such cause, he may take advantage at the hear-  
 ing. 2 Atk. 253. The same as to the want of parties. 3 Atk.  
 809, 815 ; Cooper's Pl. 165, 166, 193 ; common sum £10.

§ 17. Deft. cannot demur to a bill that seeks a discovery  
 of a mere incapacity to hold estates, as alienage, as in such  
 case there is no forfeiture. Parker, 144. Nor can he demur  
 to a bill brought for the discovery of a conspiracy in setting up  
 a bastard child, as this is no ground for a criminal prosecu-  
 tion. 2 Ves. 450 ; and see s. 9, above.

§ 18. The deft. may demur to the amended bill, that is, to  
 the amended part, though his demurrer to the original bill has  
 been overruled. 2 Brown, Ch. R. 66. So, though he an-  
 swered to the original bill. Bunb. 120. And generally, if the  
 deft. do not plead or demur, he must answer fully. Cooper's  
 Pl. 188. Except he may disclaim : 2. Is not to criminate him-  
 self : 3. Not held to answer fully, if a purchaser for a valua-  
 ble consideration without notice ; and to a bill for discovery the  
 deft. ought to object *in limine*. Cooper's Pl. 187, 189.

§ 19. May demur if the plt. in his bill state he is informed  
 of a fact where he ought expressly to assert it. 1 Vesey, 56.  
 So if the bill be on a contract which does not bind the deft.,  
 as if he be assignee of lessee and it does not run with the  
 land. Id.

§ 20. The deft. may demur to the plt's. bill, if it be for  
 relief in a matter not proper for the court to consider. Ch. Ca.  
 77. As if he pray an injunction to a *mandamus* from the  
 King's Bench, or to an indictment, information, or prohibition.  
 2 Ves. 396.

§ 21. Deft. may demur to a bill, if it be to discover if there be such a person, or where he is only to make him a party. **Ch. 226. Art. 5.**  
 2 Atk. 394.

§ 22. Where the deft. must not demur but answer. As if an officer of a company be made deft. to a bill against it for a discovery, though he is not interested, and his answer cannot be read against it, and he is examinable as a witness, and the plt. can have no decree against him, yet as his answer may tend to a discovery, as he may be prosecuted for perjury and the company cannot, and as his answer may direct the plt. to draw interrogatories, he shall not demur, but shall answer. 1 Brown Ch. R. 469. 3 P. W. 311, Wych v. Mead.

§ 23. Deft. may demur if the plt. take administration properly in a foreign country, but does not take it in this. 3 P. W. 369.

§ 24. So the deft. may demur to the plt's. bill, if he do not in it entitle himself to the thing he demands, as if the husband sue alone for a thing he has no title to without joining his wife. Ca. Ch. 41; Cooper's Pl. 166, 174. What is an interest in the subject to entitle the plt. to sue in equity, is a question that may arise in a multitude of cases, and in each the decision must usually depend on its circumstances.

§ 25. But deft. cannot demur to the plt's. bill to discover what goods the deft. bought of the plt's. agent, and what remains unpaid and for payment. 2 Atk. 394.

§ 26. A deft. may put in separate demurrer to distinct parts of the bill, for separate and distinct causes; and one demurrer may be allowed and another overruled. Cooper's Pl. 113; cites Redesdale Tr. Ch. Pl. 173. [See many cases and principles of demurrer. Cooper's Pl. 110 to 223.]

§ 27. If a demurrer be to a part of a bill, as it may be, and is allowed, the plt. may amend his bill; if to the whole, and allowed regularly, the bill is out of court, but may be amended by leave of court; and without leave he may amend before the demurrer is allowed, paying costs of demurrer, £5. A demurrer allowed on matter of form, is not a bar to a new bill; *secus*, if decided on the merits of the question between the parties. Several demurrers to defects in form, Cooper's Pl. 180, 187. Cooper's Pl. 115; several cases cited.

§ 28. The deft. may demur to the relief prayed for, or to the discovery only, or to both; and if good as to the relief, it will be so as to the discovery. Hence if the plt. be entitled to discovery only, but also prays relief, a general demurrer to the whole bill will be good. Though when the relief prayed is improper, the deft. may defend by a general demurrer, yet he may demur to the relief, if he chooses, and answer to the discovery; that is, give the discovery required. But if the 2 Vesey jr. 459, 462, Renison v. Ashley; 514, 517.—8 Ves. jr. 3.—11 Ves. 509.—2 Atk. 157.—2 Br. Ch. R. 124.

СН. 226. bill pray both, deft. cannot demur to the discovery, and answer to the relief; for the relief is the matter required, and the discovery is only the means whereby to obtain it, and the demurrer must be to the thing required, the main object; for when the demurrer is not merely to matter of form, it makes a question on the merits, and the decision thereon is conclusive, and ought therefore to involve the main object and the very merits of the suit.

Art. 5.



§ 29. *Demurrer to the jurisdiction.* Wherever it appears on the face of the plt's. bill that it is filed in a court which has not the proper jurisdiction of the subject, the deft. may demur to the bill generally, or alleging no particular cause, or specially, that is, pointing out the special imperfection. The subject of the suit may not be cognizable in any municipal court of justice, but cognizable only by the executive government. Or it may be the proper subject of political treaty;—or it may be a proper subject to be considered by some other court. But where another court in the country has the jurisdiction of the cause, there may be a plea shewing what court. Confiscation by a foreign power is a subject of political, not municipal consideration. But it is a settled principle, that neither courts of law, nor courts of equity, acknowledge any foreign jurisdiction or sovereignty, but such as are acknowledged or recognized by the government of the country,—generally executive. 11 Vesey, 283. While the United States were Colonies, their boundaries were settled by the king in council on the principles of feudal sovereignty. 1 Vesey, 404, 447. But sometimes the property in dispute may be out of the court's jurisdiction, as in the West Indies, but the deft. is found within it, as in England, in a suit in chancery there; then the court acts *in personam*, and he cannot plead to the jurisdiction. 2 Vern. 494; Cowp. 161 to 182, *Mostyn v. Fabrigas*; 5 Vesey 750, 792. But if the person in question be a stranger, not domiciled in England, dies there, having personal estate there, the English courts distribute it by the laws of his own country, and so our courts act on the same principle. The most common demurrer to the equity jurisdiction, is because there is a remedy at law, as above stated. In many cases this jurisdiction exists as to mere bills of discoveries;—exists in all cases of fraud concurrently with courts of law, except in a case of fraud in obtaining a will of real estate. 2 Atk. 424. And an accident, to give jurisdiction in equity, must be material, and proved by affidavit annexed to the bill. 2 P. W. 541. As of a deed lost &c.

Cooper's Pl.  
123, 161, 236,  
242, 292.

Weymouth v.  
Boyer.

§ 30. Demurrer lies not to the equity jurisdiction in law cases, where the remedy at law is not plain, but doubtful, and not complete. 1 Vesey jun. 416, 426. So where the remedy

at law is difficult, equity will hold jurisdiction; and it is immaterial in what manner the remedy at law is incomplete. Where a bond is lost, the remedy at law is yet incomplete, though a *profert* is not now required, because the law courts cannot provide indemnity, as equity can, against the future finding it. 9 Vesey, 464, 467; 1 Vesey, 341; 3 P. W. 390. As to accidents by fire, paying rent &c. for premises burnt, see 2 Selwyn's N. P. 394, and *Fowler & al. v. Bott & al.* Equity restores to their owners certain things, as pictures &c., that cannot be compensated in damages, and bills therefor cannot be demurred to; 3 P. W. 390; 1 Vern. 273; 3 Vesey jun. 70, 73; 6 Vesey, 773; 13 Vesey 95; even though detainee lies. Same principle as to deeds &c., and as to specific performances. See Ch. 11 &c. In equity the great object is to make the party do what in honesty and conscience he ought to do. In matters of account, partition, and dower are remedies at law, but often incomplete; hence in these equity has jurisdiction. Cooper, 134, 135: 2. Equity has jurisdiction in cases of wilful misrepresentations in matters of interest, though incomplete remedies at law exist, and to bills in such cases the deft. cannot demur. The general rule is to hold the party to make good his false representation knowingly made. 137; and see 1 Ves. 95; 6 Ves. 182; and Ch. 112; especially art. 2, s. 9; 3 D. & E. 51; 2 East, 92; and Ch. 62, a. 2, s. 1, 19; 6 Vesey, 186; Br. Ch. Ca. 420; 2 Vern. 370; 1 D. & E. 762, 775. If any contract be obtained unfairly, a court of law can treat it as void, but cannot, as equity can, make it be what it should have been, and give it just effect. See Lord Redesdale, Cooper; head of Frauds, Ch. 32 &c.; 1 Burr. 396; 1 Vern. 443, 446; 2 Vern. 206; 2 Vesey jun. 485. Because equity can, and the law cannot, fish from the parties the true intent and agreement; 2 Vesey, 483, 486;—and equity can, and the law cannot, order the contract, got by fraud, delivered up. *Id.*; and Anstr. 454; 2 Vesey, 85; 7 Vesey, 413. So in cases of mistakes. Cooper, 140. In all these cases it important to observe, that equity places "as much reliance on the conscience of the deft., as on the testimony of a single witness," other things being equal. Cooper, 145. This is a defect in equity proceedings the plt. ought to be aware of, when he brings a bill, that may lead to the deft's. plea or answer on oath.

§ 31. Equity preserves property pending lawsuits, and no demurrer lies to a bill therefor. Often pending suits at law, the property in question is in danger of being lost or injured, but for the aid of equity. The principle on which equity interposes is uniform, though applicable to numerous cases; and the property is preserved from loss or injury, according

CH. 226.  
Art. 5.

*Fells v. Read.*

*Newman v. Milner.*—  
*Adey v. Anderson.*

CH. 226. according to the nature of the case. Perishable property is ordered to be sold; and the disposal, use, or transfer of property is forbidden, as the case may be. 1 Atk. 286; 6 Ves. 72; 2 Br. Ch. R. 122, 322. The party asking for the preservation must ever have an interest in the thing to be preserved; Cooper, 147; and there must be an inability to preserve it in the court in which litigated, to enable equity to interpose. 1 Vesey, 324.

§ 32. *Equity aids in suits at law in removing obstacles to a fair trial*; and in giving effect to judgments;—and bills to these purposes cannot be demurred to, when reasonable and according to practice. In these respects chancery merely aids other courts. In proceedings at law, a mere legal advantage, not important, is often an impediment to a fair trial on the merits. This advantage equity will restrain, remove, or control, in order to a fair trial on the merits, where the law cannot. Cases, 10 Vesey, 260, 270, 544; 1 D. & E. 763, Willoughby v. Willoughby, stated Ch. 112, a. 2, s. 9; see Goodtitle v. Morgan, 1 D. & E. 758, 762, and cases therein cited; see Doe v. Pegge. Equity cannot interpose unless such obstacle be real and material; nor if it appears in the bill or plea, the deft. is a purchaser, or mortgagee, for valuable consideration, and without notice; and if either appears in the bill, the deft. may demur to it, for reasons already stated. As to equity's aid to give effect to judgments at law, it may be useful in several cases. As a bill in equity to oblige the judgment debtor to discover property to satisfy the execution issued on the judgment, or to set aside a deed fraudulently got to defeat it; as 1 Eq. Ca. Abr. 77. The plt. in his bill must state his judgment, and describe the property aimed at as well as he can, and aver he has taken out execution. 1 Eq. Ca. Abr. 77. But a judgment creditor, to be entitled to relief as to a fraudulent deed, must shew he was a creditor when it was made. 1 Eq. Ca. Abr. 149. And he is not a creditor, though the cause of action in *maleficio* arise, and is even sued, before the deed is made, if his judgment be after. Id. A wife gets a decree for alimony, and her husband threatens he will leave the kingdom, chancery will grant a *ne exeat regna*, till he gives security. 1 Ch. Ca. 115. So it will sometimes order monies applied. Armistead v. Philpot, Doug. 231; Angel v. Draper, 1 Eq. Ca. Abr. 77.

Smithier v.  
Lewis.

Leukener v.  
Freeman.

Cooper's Pl.  
163, 192.

§ 33. *The plt.'s disability the ground of demurrer*. If the disability be apparent in the bill, the deft. may demur to it; as if a minor or married woman sue alone, or if a bankrupt sue. Such a demurrer extends to the whole bill of course; but such disability is proper for a plea if it does not appear in the bill, as then the deft. must state it. So if it appears in

the bill that the plt. has misdescribed himself, the deft. may demur to it; as if plts. sue as a corporation, when it appears in the bill they are not incorporated. But generally such misdescription must be the subject of a plea. 9 Vesey, 77. And where the members of a society are numerous, and not incorporated, a part of them may sue, and it is no cause of demurrer. Prec. Ch. 592. And where many are concerned in a common right, as a fishery or custom of a mill, all may be made defts. Cooper's Pl. 183, 193.

CH. 226.  
Art. 5.

§ 34. *The plt's. sufficient title.* Another general principle,—the deft. may demur to the plt's. bill, if he do not state in it a sufficient title or equity, to enable him to support it. This is clear, and in the numerous cases of bills, the question usually is, what is a sufficient title; as to which only a few general rules can here be noticed: 1. The plt. must state a complete title, or real interest as to land by legal writings, not *parol* agreement. 2 Br. Ch. Ca. 568, 610; 13 Vesey, 240, 552. And if he state a mere *nudum pactum* as his title, the deft. may demur. 2 Br. Ch. Ca. 610. So if he states an informal title;—so administration taken abroad, or a will not proved. 1 P. W. 766. But the plt's. title may be good, though litigated, or may be litigated, if complete, as a will proved, though disputed; 3 D. & E. 125, 133, *Allen v. Dundass*; as the probate is valid till repealed. 1 Vern. 106; 3 P. W. 370. 2. Where the bill is merely to preserve property, *pendente lite*, a doubtful title is sufficient. 3 Atk. 286; 2 Br. Ch. R. 121. 3. But if the plt. show no title at all, deft. may demur to his bill, though only to secure the fund. 2 Br. Ch. R. 322. 4. A future title that may or may not accrue, is not sufficient. 1 Eq. Ca. Abr. 5. So if the plt's. claim be illegal, or founded in turpitude, deft. may demur to his bill. 1 Vern. 5; Cooper's Pl. 171, 172, 177. See Ch. 49, s. 11, s. 12, fees demanded on contracts made against public polity. Also 8 D. & E. 89. Marriage brokerage bonds give no title. But see Ch. 15, a. 3, *Bunn v. Guy*. So if the plt. have title to the thing, the deft. may demur to his bill if it appears in it the deft. is not the person to be called on, but some other. Cooper's Pl. 174, 175, 193, 194. Or the deft. is not answerable to the plt. *Id.*; 2 Vesey jun. 95, 98; 9 Vesey, 77; 3 Br. Ch. R. 264; 1 Vesey jun. 427, 431, *Isanc v. Humpage*. No action will lie at law. Cooper, 193.

*Atterson v. Mair.*

§ 35. *Deft's. want of interest.* It is a general rule he may demur to the plt's. bill, if in it the deft. does not appear to have any interest or concern; for if the plt's. bill show no interest in the deft., there can be no decree against him, as if a mere witness &c. Cooper's Pl. 176, 177, 196, &c.; 5 Vesey, 177; 3 P. W. 310. As a bankrupt has no interest, he is no

*De Golls v. Ward.*



CH. 226. party. So arbitrators. 2 Vern. 380. Except a charge of  
 Art. 6. corruption; and if proved, may be a decree for costs against  
 them. 2 Atk. 396; 2 Vesey jun. 451, 454. So an attorney  
 joining in a fraudulent act to the plt's. injury. 1 Schoales &  
 Lefroy, 227. It is a general rule, one, to be a deft., must  
 be liable to the plt's. demands. 1 Vern. 180; 5 Co. 16, 19;  
 1 Vesey, 56. As in covenants touching lands, it must appear  
 the deft. is bound by them, and answerable to the plt. If the  
 deft. have no interest, he may demur or plead; Cooper's Pl.  
 250, 294; or disclaim. 294.

§ 36. Demurrers to informations are nearly on the same  
 principles as demurrers to bills, with an exception, that the  
 case is not of a nature to require the attorney general's name  
 to be used; and except special matters as to public charities.  
 See sundry cases, Cooper's Pl. 219 to 221; pleas to, 307, 308.

ART. 6. *Plea in bar.*

Mitford's  
 Pleadings, 16.

§ 1. When the deft. cannot rely on his plea in abatement,  
 or on his demurrer to the plt's. bill, or when either is over-  
 ruled, he also has recourse to his plea in bar; the principles of  
 which are stated, Ch. 193, a. 22, synopsis of pleadings, also  
 generally what may be pleaded in bar in equity;—and is usually  
 on oath. It is governed nearly by the same principles a plea  
 in bar at law is, to illustrate which here will be added a few  
 cases and authorities. It is material to know what matter the  
 deft. ought to use by way of demurrer, of plea, or of answer,  
 each has its peculiar office in pleadings in equity. This plea  
 admits the plt's. right but for the collateral matter in bar.

§ 2. *General rules.* A plea in bar is bad, which denies  
 but a part of the material facts in the bill. A mere denial of  
 facts is proper for an answer, and not for a plea. 3 Cranch,  
 220; and see Milligan v. Milledge. A judgment at law  
 against an executor is not a good plea in bar to a bill to dis-  
 cover assets. 2 Cranch, 408, and see Telfair v. Stead. So  
 want of proper parties in a bill is not a good plea in bar to it,  
 if it state they are out of the court's jurisdiction. 3 Cranch, 220.  
 How an account stated is a bar to a bill, Ch. 38, a. 13. And  
 every plea in bar must tender issuable matter. 1 Ves. jun. 393.  
 And no evidence is admitted in equity more than at law, but  
 such as applies to the facts put in issue and stated in the bill  
 or plea. 6 Johns. R. 543. If an insolvent omit to plead at  
 law, the effect; see Riely v. Lamar & al. If a plea in bar  
 be allowed or not, it is peremptory; 1 Vern. 73;—or it may  
 be ordered to stand for an answer saving just exceptions, then  
 the plt. replies, a deft. proves the fact of the plea. Prac. Reg.  
 in Ch. 283. Deft. pleads and dies before plea argued, his  
 representative must plead *de novo*. Plea in bar is on oath; 2  
 Ca. Ch. 208; except the matter of it be of record. Id. 237.

Object of the plea is to reduce the inquiry to a single point, and to avoid an inquiry at large. Cooper's Pl. 223, 250 to 289. Ch. 226.  
Art. 6.

§ 3. *Form of a plea in bar.* As at law it must be plain and to a single point. It does not do if it contain two or more different and distinct points. In such case an answer is more proper; hence, if such a plea be pleaded it will be ordered to stand for an answer, with liberty to except. 1 Brown Ch. R. 417, 418. But as at law, several facts may not make a plea multifarious, as if it be a plea of a conveyance, and of fine and non-claim. This is a good plea to a bill impeaching the conveyance, as not being for valuable consideration. 2 Brown Ch. Ca. 274. A buys for valuable consideration, and the bill charges particulars of notice, the deft. must deny all the circumstances particularly. 2 Brown Ch. R. 146. The plea must not put a negative on the bill, for the denial of the facts stated in it are proper for an answer. The plea must confess and avoid, as every special plea must. 1 Brown Ch. R. 409. A plea that brings no new matter before the court is bad, as if the deft. plead an admiralty sentence stated in the bill. 1 Brown Ch. R. 56, 57, 411. A plea that covers too much is bad. 1 Vesey, 202. A plea, like a demurrer, is prefaced with a protestation against admitting facts in the bill. Cooper, 230. But the only use seems to be to prevent conclusion in another suit, for the bill is admitted to be true so far as it is not denied by the plea, notwithstanding the protestation in it, and it does not make the plea the more valid in the existing suit. 2 Atk. 155. And generally, so is the office and effect of a protestation in pleading generally. And after protestation the deft. must apply his plea, as he means it, to all or to some designated part of the bill, then he states the substance of his plea and makes the proper conclusion.

Plea is bad where there should be an answer. As if the plt. make title as heir; plea, the plt. is not heir, is improper. Deft. must deny the title, by way of answer, and as explicitly as it is laid. 2 Brown Ch. R. 143. Plea for want of parties is in bar to the whole bill, discovery and relief; 2 Atk. 51; as without proper parties neither can be had. If any fraud be alleged in the bill, it must be denied by way of answer and not by plea. 1 Vern. 185. A plea may be bad in part, and yet not bad in the whole. 1 Atk. 52. If the defence consist of several matters, it is proper for an answer, not for a plea, as the examination must still be at large, and not to a single point. Cooper's Pl. 223. And a plea is double and bad that contains two distinct points: as 1. No contract in writing: 2. No acts in part performance. 223, 224, 230. But good as an answer. Id.

§ 4. *Plea in bar as to plt's. disability.* As alien born, in

13 Ves. 437.

1 Br. Ch. Ca.

404.—3

Anstr. 738.—

4 Br. Ch. Ca.

253.—2 Ves.

Jr. 84, 87,

614, 617.

CH. 226. certain cases. 2 Atk. 397. Plea of conviction of a capital crime, same as at law. Id. Outlawry in another cause. But if one deft. plead outlawry in the pk., it is good only for himself. Ca. Ch. 3. If one sue in *auter droit*, this is no plea. 1 Vern. 84; 1 Eq. Ca. Abr. 37. A plea to the person must shew that the party is disabled, as above. Id. After a plea in disability, as outlawry &c., or to the jurisdiction is overruled, the deft. may plead in bar. Cooper's Pl. 226; but *quære*.

2 Eq. Ca.  
Abr. 70, 77.  
—Cooper's  
Pl. 277, 280.  
—3 Br. Ch.  
Ca. 7, 70.—  
5 Ves. 87.—  
12 Ves. 279.  
—5 Anstr.  
637.

§ 5. *Account stated pleaded in bar*. This is a good plea; but if there be any agreement to rectify mistakes, it concludes not, though under hand and seal. 2 Freem. 183. A plea in equity is a special answer to a bill, or to some part of it, shewing or relying on one or more things as a cause why the suit should be dismissed, delayed, or barred. Pleas in equity are of three kinds: 1. To the jurisdiction: 2. To the person: 3. In bar. A plea of a stated account must shew it was in writing and what the balance was; 2 Atk. 397; and aver that it is just and true to the best of the deft's. knowledge and belief. 3 Atk. 70, 303; Ca. Ch. 262.

But after account stated there may be account *de novo*, upon the plt's. shewing particulars in which the account was mistaken. Ca. Ch. 262. So if settled by collusion. As between mortgagor and first mortgagee, he was compelled to give a new account, on the allegation of a second mortgagee of collusion between them, and shewing the particulars misstated. Ca. Ch. 299. And if no particulars shewn the deft. shall answer to the collusion. Id. So opened if compound interest was allowed, though a release be given. 3 Ch. R. 18; Skin. 148. Dividend made between partners is not an account stated. 1 Atk. 1; as to fraud, 5 Ves. 485; 13 Ves. 47.

Though a stated account must be in writing, it need not be signed; it is enough the party to whom it is sent keeps it a length of time without making objection. 2 Atk. 251; 3 Atk. 676. After an account stated it cannot be opened but on the ground: 1. Of mistake: 2. Of fraud or collusion. Hence, he who will open it must shew in what particulars it is mistaken. Ca. Ch. 299; 1 Vern. 180; Ca. Ch. 127; 2 Atk. 112; 2 Vern. 276; 2 Ves. 239, 527.

*Averment in pleas, how positive*; generally must be of every fact material to render the plea a bar as the ground of an issue; but in some few cases the deft. may aver according to the best of his knowledge and belief. Cooper's Pl. 227.

§ 6. *Plea in bar—another suit depending in the same or another court for the same cause*. The principle is the same in this respect in equity as in law; the deft. is no more to be vexed twice for the same thing in the one than in the other. But if a plea be, that the bill is brought for the same matter

for which the plt. brought another bill, it is bad if the last bill be in a different right. 2 Atk. 44. But to support this plea of a former decree, so much of the former bill and answer must be stated as to shew the same point was in issue. Id. 603. Nor can a decree in a former suit for the same matter be so pleaded in bar till it is enrolled; Id. 869; but may be insisted on by way of answer. 2 Ves. 577. And an infant plt. is bound by a decree. 3 Atk. 626; 1 Vern. 310. Another bill for the same cause dismissed, bars. And 2 Atk. 82; Cooper, 286, 269; 1 P. W. 352; 3 Atk. 606.

Ch. 226.  
Art. 6.

1 Ch. Ca.  
165.—2 Ves.  
577—Redes-  
dale's Pl. 196.

A former bill pending was pleaded in bar of a second, but though both bills were of the same nature and effect, yet as the latter had some new matter in it, ordered as the plea was good, the plt. pay the usual costs of a plea allowed. But held the deft. answer the second bill; and the former bill dismissed with 20s. costs. 1 Ch. Ca. 241.

1 Eq. Ca. Abr.  
37, Crofts v.  
Wortly.

Bill for an account of a trust. Deft. pleaded he was entrusted for three children, the plt. and his two brothers, they not joined, so deft. not held to answer; *secus* he might be, had the three called him to account for the same matter. Plea good. Deft. pleaded the plt. brought a former suit for the same matters, "which suit is still pending for aught he knows to the contrary. Plea allowed. The fact of the pending suit to be examined by the master, and held the deft. never puts in this plea on oath. 1 Vern. 332. But no suit is pending till the parties appear or have been served to appear. 1 Eq. Ca. Abr. 39. To make the dismissal of a bill a bar, the court must clearly decide the plt. had no title. 1 Atk. 571. So this plea must show the deft. was served with process or appeared. Abr. Ca. 39. So shew when the former suit was instituted. 3 Atk. 587, 590. Cooper's Pl. 268, to 276.

1 Vern. 110,  
Hanne v.  
Stevens.

1 Ves. jr. 484.  
—Cooper,  
274.

§ 7. *Award pleaded in bar.* This is a good plea to a discovery as well as to the merits, unless there be collusion or gross misbehaviour. 3 Atk. 529. And if a bill be brought against arbitrators for discovery of the grounds of their award, they may plead they are not obliged to state them. 3 Atk. 644. A bill is for a general account, and a plea of an award is allowed to it, yet the plt. may at the hearing object to the award for fraud or partiality in the arbitrators. 2 Atk. 501; 3 Anstr. 735; Cooper's Pl. 280, 281.

2 Atk. 395.—  
3 Ch. Ca.  
198.—Bunb.  
266.

§ 8. Statute of frauds is a good defence, pleaded to a *parol* variation of an agreement for a lease; not if it only amount to a waiver of part or to a declaration of trust. The plt. filed a bill for an account; the deft. in his cross bill pleaded an agreement, under seal in defence; the plt. cannot prove it fraudulent, because no fraud is alleged in his bill. 6 Johns. R. 543. In pleading the statute of frauds it is necessary to say,

1 Ves. jr. 402,  
Jordan v.  
Sawkins.  
This statute  
can never be  
used to cover  
fraud, Coop-  
er, 340, 258,  
&c.

CH 226. that the agreement was not reduced into writing. Prec. Ch. 533; and Cooper's Pl. 255 to 258.

Art. 6.

Cooper's Pl. 286, 289, 300.

1 Eq. Ca. Abr. 38,  
More v. May-  
how.—Ca.  
Ch. 34.—  
Hard. 610.—  
14 Ves. 69.—  
2 P. W. 281.  
—9 Ves. 32.  
—Ambl. 421.  
—1 Atk. 571,  
—2 Ves. jr.  
464.—7 Ves.  
567.—10  
Ves 246.—  
2 Atk. 631.—  
1 Ch. Ca. 34.  
What is no-  
tice, Cooper  
284, 285.—  
1 Atk. 571.—  
2 Atk. 139.—  
3 Atk. 646.—  
2 Vern. 574.

§ 9. Deft. pleads in bar he is a purchaser for a valuable consideration, and without notice of the plt's. interest &c.—includes mortgages and marriage settlements.

A bill is for relief on a trust, charging the deft. with notice of it before taking his conveyance. Def. by way of answer, may deny the notice and plead he is a purchaser for valuable consideration, without shewing what the consideration was, though it was objected that 5s. is a valuable, though not an equitable consideration. The plea must deny notice at the time of the conveyance as well as at that of the contract. 1 Ch. Ca. 34. Plea of purchase for a valuable consideration overruled, because the deft. did not allege seizin and possession in the vendor. 1 Vern. 246. Def. need not mention the time of his purchase; Hard. 510;—but must that he was purchaser without notice, or the plea is bad. 2 Vent. 361. To a bill for a discovery of the deft's. title it is a good plea that in a writ of right the title was decided against the plt. 1 Brown's Ch. R. 305. If the bill be for discovery leading to relief in law the deft. cannot plead in bar to the discovery, matter a bar to a legal remedy; 2 Brown's Ch. R. 11; can only plead in bar of the discovery. If the plt. alleges the deft. had special notice, he must deny it specially. 3 Atk. 815. Deft. must pay before he has notice of the plt's. title. 3 Atk. 304, 814. And notice is by way of answer, and not by plea. 2 Ca. Ch. 161. The plea must aver the deft's. vendor was seized, or pretended to be seized, when he executed the purchase deeds. 2 Atk. 630. In such cases if fraud be charged in the bill, deft. must answer to the fraud. 1 Vern. 185. Must shew the vendor seized and possessed. 1 Vern. 246. Bill for a discovery, deft. pleads what he knew was only as counsel, arbitrator, &c. Ca. Ch. 272. The principles are the same in pleas as to goods. 1 Vern. 27, 77; 3 Atk. 70, 303; 2 Atk. 51, 397; Ca. Ch. 262; 2 Ves. 107, 243. If the present deft. got a decree fraudulently, and a bill is filed against him to set it aside &c., and he pleads this decree, his plea will be overruled, and not allowed even to stand for an answer; and held a gross fraud is sufficient to set aside any decree. 2 Will. R. 73. General rule, if one has lost his right by a legal bar, he can have no remedy in equity whatever may be the circumstances.

Cooper, 260,  
262.—2 Atk.  
240.

§ 10. *Limitations in equity.* A bill for settling accounts may be barred by lapse of time and death of original parties. 2 Johns. Cas. 632. Plea of limitation. Bill amended so as to state the frauds charged in it came to the plt's. knowledge within six years. 2 Dallas, 363. A rule is, that the door of

equity cannot remain open forever; nor can equity decree against the legal and express stipulation of the parties themselves. 4 Dallas, 347. Held, the act of limitations of Georgia does not apply to mortgagees, the mortgagor's possession is not adverse &c. 4 Cranch, 414. Equity does not hold contracts to be executed after a delay of seven years. 8 Cranch, 471. After bill, answer, and replication, nothing was done for above twenty years, yet specific performance was decreed,—acquiescence on both. 3 Wheat. R. 304 &c. So decreed after fourteen years delay, the contractee having had possession. *Id.*; 9 Johns. R. 450; see sundry cases, 6 Ves. 646; 7 Vesey, 205; 2 Com. D. 484 &c.; 5 Ves. jun. 129, 480, 565, 736, 744, 818, 842; 2 Eq. Ca. Abr., several cases, 71 to 77. Statute of limitations may be urged by way of answer. 71. A bill of revivor is also subject to the act of limitations. Cooper's Pl. 301; 1 P. W. 742.

§ 11. An answer to support a plea. This must be full and clear, for it is a rule for the court to intend matters plainly and positively averred against the pleader, unless he fully and clearly denies or answers them; for when a party clearly and positively affirms a matter, equity deems it true till the contrary appears. But this rule does not extend to every circumstance stated in the bill; hence it is sufficient if the substance of it be well answered, and the plea is supported. 3 P. W. 145. At law a plea is the only mode of defence. It is not so in equity, for the deft. has also his answer; and this is one reason for confining his plea to a single short point, for when many matters are charged in the bill, deft. may answer also. There must be "answers to support pleas in particular cases; and all the facts requisite to render the plea a complete defence to the case made by the bill, must be clearly and distinctly averred. As if the statute of limitations be pleaded, and the bill (by anticipation) charges matter that may avoid the bar, as a promise within six years, such charge is to be met by proper averments in the plea; and this also must be supported by an answer denying the charge. This anticipation in the bill makes confusion, but is sanctioned by practice, which allows the plt. in his bill to state matters by way of answer, to what he expects the deft. will allege on his part in his defence. Thus the plt. brings his bill to have performance of a *parol* contract as to lands, and thinking the deft. will plead the statute of frauds, anticipates his defence, and alleges in his bill a part performance; thus blending in it matter in its nature proper for a replication. In this and other ways, the bill is often multifarious, when the plea is not allowed to be so, but as at law is confined to a single point; whence the necessity often of an answer to accompany it by way of

CH. 226.  
ART. 6.

Cooper's Pl.  
226 to 235,  
294.—6 Ves.  
584.—1 Vern.  
186.—3 Atk.  
70, 304.—14  
Ves. 59, 66.  
—Mossley,  
40.

**CH. 226.** denial. The object of which answer is, to give the plt. an opportunity to except to the deft's. denial of the facts charged in the bill, as above. This answer is subject to rules. It must not be evasive, but direct. But an answer is not necessary to support a plea, if fraud, or notice, or some ground of avoiding the bar be not charged in the bill. Thus a bill for a discovery, to make which the deft. must criminate himself; this he may plead without an answer to support his plea; and it is enough it show how this discovery will subject him to penalties or forfeitures. As if a bill state a deft's. marriage with a particular woman, he may plead she is his sister, and refuse to state any thing more. It is sufficient to answer as to any one fact forming a link in a chain.

*§ 12. Plea and answer must be applied to distinct parts of the bill.* Therefore a plea is bad which is to such part of the bill as is not answered, as it puts the court to inquire what part is not answered;—this is troublesome in a long bill;—and further, deprives the plt. of the benefit of excepting to the answer. And this rule agrees with the general rule, which is, that if the plea do not go to the whole bill, it must distinctly express to what part of it the deft. pleads it.

*§ 13.* If one defence be made by the answer, another by the plea, it is ordered to stand for an answer. And if the plea be to the whole bill, and a bar to all, an answer to any part of the bill overrules the plea. Though a plea may be good in part only, yet if pleaded to the whole bill and covers but a part, it is bad in form. Good in part, that is, as to part of the matter in the bill. As if it pray for an account of real and personal estate, a plea thereto may be allowed as to the *personal*, and be overruled as to the *real*; for such plea is not double but single, though it applies to distinct subjects, introduced by the plt.

*§ 14. Two matters pleaded, one only a bar, neither is allowed.* As to a bill deft. pleads: 1. A fine and non-claim: 2. A *boná fide* purchase: the last being no bar, deft's. answer admitting notice, neither is good;—is pleading double. So if the plea in either part be informal, all is bad, as the court never separates two matters so pleaded. At law each such matter must be in a distinct plea, under leave to plead double.

*§ 15.* If an answer accompany a plea to support it, in its preface the deft. avers he does not thereby waive his plea, but relies thereon, and this whether to all or part of the bill the plea is pleaded. In fact the deft. must state in his answer, he means it to cover only such parts of the bill as are not covered by his plea; and each plea and answer ought to state distinctly the parts of the bill it is meant to cover. It seems a plea not strictly proper as such, may sometimes, however, be

Moseley, 40,  
Broom v.  
Horsley.—  
2 Vesey, 108.  
—Cooper's  
Pl. 227, 230.

6 Vesey, 12,  
17.—Cooper,  
229, 231.—  
3 Anstr. 633.  
—8 Vesey,  
408.

Cooper, 230.  
—3 Anstr.  
738.

Cooper's Pl.  
230, 232.—  
Prac. Reg.  
230.

ordered to stand for an answer by the court, or if the plt. submit ; to it and then the trial proceeds on the merits. And if the deft. fail in his proof, he may still be held to his discovery on interrogatories, and he gains his cause if he proves the point put in issue by the plea. When the plea is allowed the cause is heard and the deft. opens, as he is only to prove his plea. See art. 8, s. 3 ; and how an exception to an answer allows the plea. *Id.*

CH. 226.  
Art. 6.

2 Vesey, 247.  
—6 Ves. 596.

§ 16. Though when the trial is on the point put in issue by the plea, as a plea, the decision is final, the case is not so when the benefit of the plea is reserved to the hearing ; as then the decision does not rest on the truth of the matter of the plea, but the plt. may avoid it by other matter he may adduce. In fact, the trial is more at large. And if a plea be ordered to stand for an answer, it is merely matter of defence in whole or in part, but no full defence, though not affected by any new matter produced by the plt., as the trial is still more at large.

Cooper's Pl.  
233.

§ 17. *Plea how corrected.* May be amended if defective only in form by mere mistake, and containing substantial grounds of defence, but the deft. must state how the slip happened, and his proposed amendment, precisely ; and a plea not amendable may, by leave of the court, be withdrawn, and the deft. plead *de novo* in a short time.

2 Br. Ch. Ca.  
143.—13  
Vesey, 435,  
436.

§ 18. *Difference between demurrer and plea &c.* The former is more limited, as it extends only to objections appearing in the record itself ; but a plea generally proceeds on other matter, hence the grounds of it may be very numerous as to the jurisdiction, the person, or the matter in bar. And this latitude is allowed to a plea, as a bill may be so drawn, and often is, as not to disclose the whole case, and of course so as to afford but a partial view of it ; and where too the case itself may be such that if the bill give a full view of it, the bill may be open to a demurrer. When the bill is thus partial, equity allows the deft. to resort to his plea for his defence, by which he may, in fact, set the case right by alleging additional matter of fact. And Cooper says, 234, "that in most cases what is a good defence by way of plea, is held to be also good by way of demurrer, and as elsewhere observed, the difference is mainly in the manner of bringing the facts before the court. In cases of demurrer to bills, the plt. in his bill states them to the court. In cases of pleas the deft. in his plea, or in his plea aided by his answer to support his plea. This brings us again to the rule of all rules in all pleadings in all courts, that is, to an accurate but concise statement of the material facts of the case whereon the decision is to be made."

2 Ves. jr. 450,  
451.



Ch. 226.

Art. 6.

Wyatt's Prac.  
Reg. 327.—  
6 Ves. 594.—  
Cooper's Pl.  
236.

§ 19. *Nature of a plea in bar in equity.* It acknowledges the plt's. right to sue, but for the matter *dehors* his bill pleaded in bar by the deft. 6 Vesey, 594. Therefore, such plea is collateral to the bill, it never traverses, as a plea to the person does. 2 Br. Ch. Ca. 145. Its character is, as is that of a special plea at law, to introduce some fact or facts in defence not found in the plt's. bill or declaration; and pleas to the jurisdiction, to the person, and in bar, may be pleaded, "one after another, the same as at law;" "for though no man shall be permitted to two dilatories at several times, nor several bars, because he may plead all at once, yet after a plea to the jurisdiction or in disability, he may be admitted to plead in bar, because it was not consistent with those pleas to plead in bar at the same time." Though this is a good general rule, not consistent &c., yet it has its exceptions, as appears in several parts of this work. "You never traverse in a plea in bar." Cooper, 251; cites 2 Br. Ch. Ca. 144. He classes pleas in bar under three heads: 1. Statutes, as of frauds &c.: 2. Pleas of matter of record: 3. Pleas of matter *in pais*, as a release, account stated, &c. Instances of which see in this and other chapters. And on examining the cases it will be found, that any one who can properly plead these matters at law, will find no difficulty in pleading them in equity. "If the deft. plead fine and non-claim, or any other strictly legal bar, the same strictness is required as at law," in regard to alleging seizin and other facts. 2 Atk. 633; 2 Ves. jun. 450, 451, Page v. Sever.

§ 20. *A foreign judgment how pleadable in bar.* A sentence even of a foreign court may be pleaded in bar to a bill, if such court have full jurisdiction to decide the rights of the parties. 3 Atk. 215. Otherwise not. As where a deft. pleaded a foreign sentence in a commissary court in France (the *bureau des actions*;) plea overruled, because this court was appointed to decide questions of a different nature from that stated in the bill. Thus an English court necessarily decided upon the powers of a court in France, as is often done.

§ 21. *A domestic judgment how pleaded, when the bill charges fraud &c. as the ground of relief.* Properly to plead it the fraud must be denied, alleged in the bill, and by the plea put in issue, and the plea supported by a full answer to the charge in the bill; 6 Ves. 596; for a judgment obtained by fraud is no bar. Hence, the charge of fraud must be tried, and the deft. plead accordingly. Cooper's Pl. 266, 267, To be a bar, must be final in its nature. 2 Vesey, 450. A bill dismissed is no bar to another, if for defect in form or want of prosecution. 1 Atk. 571. How by it those concerned in an estate tail are affected. 9 Vesey, 57. Must be averred

1 Vern. 397.  
—12 Vesey,  
321.

3 Br. Parl.  
Ca. 584.—  
6 Vesey, 596.  
—3 Atk. 586.  
—1 Vern.  
332.—3 Atk.  
567.—3 Ves.  
jr. 157 to  
170.—4 Br.  
Ch. Ca. 60.—  
1 Atk. 408.

the defts. appeared to the former suit in equity, or did answer, or were served, or it is no-bar to a second. 1 Eq. Ca. Abr. 39. For a suit is not pending till one of these things is done; and the plea must aver the former suit, including the point and interest for which the second is brought, (1 Eq. Ca. Abr. 39,) to make it a bar. 3 Atk. 586. And the first may bar the second, though not precisely between the same parties. Redesd. Tr. Ch. Pl. 198, 199; 1 Eq. Ca. Abr. 39, ca. 14, Moore's case. But must be substantially between the same; 4 Br. Ch. Ca. 60; and in the same right. 2 Atk. 44; and s. 6. If the master report the two suits are for the same matter, the plea is allowed if in proper form. Cooper, 274. If otherwise, it is overruled. Id. The plt. gets the reference to the master. 2 Ves. jun. 672.

CH. 226.  
Art. 7.

Baker v. Bird.

§ 22. *A release pleaded in bar.* This may be when the plt. or the person under whom he claims has released the subject of his demand. Wyatt's Prac. Reg. 328. Must be under seal. Cooper, 276. And if fraud, surprise, inadequacy of consideration, &c. is objected to the release in the bill, the plea must meet such objection by averments in the body of it, and also be supported by an answer denying the charge. Id.; and 6 Vesey, 586; 3 P. W. 315. Same if fraud be objected in an account stated. 6 Vesey, 595; Cooper, 279. Same if fraud and partiality in an award. Cooper's Pl. 280, 283.

§ 23. Notice to a purchaser of a prior title, may be in fact or constructive; to the agent is to the principal. 3 Atk. 646. But must be in the same transaction. 2 Vern. 574. If A purchase without notice, B buying of him with notice, has the benefit of A's want of it. 1 Atk. 571; 11 Vesey, 478. Every one is presumed to have notice of a decree. So of an instrument under which his grantor holds;—so of a fact to which his title-deeds lead him. So what is sufficient to put one on inquiry is notice in equity. Cooper's Pl. 284, 285. Judgment not in equity, though it is at law. Id.

ART. 7. *Answer in equity.* See also principles of this, synopsis, Ch. 193, a. 23, s. 1 to 10.

§ 1. *General rules.* Generally one deft. is not to be prejudged by the answer or admission of another; one reason seems to be this, the plt. may make his friend co-deft. to answer in his favour. 1 Will. R. 300; 3 Will. 311; 4 Vin. Abr. 443. Deft. must answer all the charge in the bill. 2 Eq. Ca. Abr. 67. If he give a general answer, he must answer a particular question included in it; or else his answer may be demurred to, as that may be a matter of judgment; but is not held to answer any question which may subject him

Now settled the deft. does not protect himself from discovery by an answer, but by demurrer, plea, or disclaimer, Cooper's Pl. 312; must be full and direct, 313.—

14 Vesey, 415.—3 Vesey, 368, 494.—3 P. W. 375.—11 Vesey, 273.—Parker, 144.—2 Vesey, 243, 493.—8 Ves. 405.—14 Ves. 69.—2 Atk. 453.—Moseley, 76, 77.—Mitford's Pl. 15.

CH. 226. to a penalty or forfeiture. Id. Answer is generally on oath.  
 Art. 7. If the deft. deny the fact, he must do it directly, and not by



way of negative pregnant. Id. Where every clause in the bill is fully answered, adding a general traverse is improper. 2 Will. R. 87. Corporation aggregate can only answer under its common seal: though false, is not liable for perjury. 2 Eq. Ca. Abr. 68; Cooper, 325. A deft's. answer may be sufficient by reference to another. 1 Eq. Ca. Abr. 34. If a plea be improper, but the matter of it good, it may be ordered to stand for an answer. Id. 36. Though a conveyance of an estate be absolute in form, yet if it appear by the deft's. answer, he was to hold in trust, he will be decreed a trustee. 2 Vern. 288. A second answer may be put in pending exceptions to the first. 1 Vesey jun. 87. A second answer may be filed any time before the order to amend. Id. 88. The deft. is not bound by a *mistake* in his answer referring to an instrument, as to the effect of it. 2 Vesey jun. 372. Answer must be to facts. 2 Vesey jun. 187. If the deft. do not demur or plead, he shall answer to the bill. 2 Com. D. Chan. R. But enough he answer as to his own interest. Id. Though not to criminate himself, yet he must confess a trust or promise he has made. Cooper's Pl. 295 to 299.

Leeds v. Marine Co. of Alexandria, cited 1 Phil. Evid. 285.

§ 2. *American general rules.* Answer of one deft. not evidence against another; nor are the answers of an agent against his principal;—nor his admissions in *pais*, except when part of the *res gesta*. 2 Wheaton's R. 380, 384. The deft's. answer, though he is interested to the whole amount in dispute, if not contradicted by any witness in the cause, is conclusive. 3 Wheaton's R. 520. If a bill be for discovery and relief, and good as to the first, without affidavit, but not as to the relief, it is retained, as to the sound part; and to this the deft. must answer, and may demur to the other part. 1 Johns Cas. 429. A bill supported but by one witness cannot be decreed, being denied by the defts. answer. 6 Johns. R. 523. Where an answer is not properly signed and put in, all the subsequent proceedings are irregular. 7 Johns. R. 557.

Lenox v. Frout.

Swift v. Dean.

Rogers & ux. v. Cruger.

Cited 1 Phil. Evid. 236.

A general power to act as to an estate, does not authorize an answer in equity, as to such estate. It must be signed and put in on oath by the party. Id. The deft's. answer, where good against the plt. or other defts. See *Field v. Holland*; where held it is good against other defts. claiming through or under the deft. making the answer. 6 Cranch, 9. Not when he is substantially plt. Id. Is evidence against the plt., though doubtful if a decree can be made against such deft.

Roberts on Frauds, 155, 163.—6 Ves.

When the plt. has alleged a parol agreement in his bill as made by the deft., it has long been a contested question, if  
 jr. 37, 548.—2 Bro. C. C. 566.—7 Ves. jr. 340.—3 Ves. jr. 34, 379.—1 Vern. 221.

the deft. is compellable to confess or deny, (part performance out of the case;) the better opinion seems to be, that he is not. Also if he confess it, yet he may pray to have the benefit of the statute of frauds. There is clearly great danger of perjury in compelling the deft. to confess or deny what he is deeply interested in; and the maxim, *vigilantibus &c.* applies. Ch. 110, a. 6, s. 15; 2 Atk. 154; 4 Vesey jun. 24; 9 Vesey jun. 35.

CH. 226.  
Art. 7.

§ 3. *Cases.* Deft's. answer replied to by the plt., but he does not serve the deft. with a subpœna to rejoin, he may rejoin *gratis*, to prove his answer; but the plt. cannot force him to rejoin without a subpœna. Moseley's R. 123. If the deft. obtain an order for time to answer only, he may put in a plea. Id. 207; 1 Ch. Ca. 279; 2 Ch. Ca. 208; 1 Vern. 275. If A file a bill against B, whose plea is allowed, and B files a *cross* bill against A, and his answer is reported insufficient, A loses his priority of suit, and must make a good answer to B, before B is held to answer A's amended bill. 3 Atk. 724.

§ 4. Bill for discovery and account, deft. objects to it by answer, that he has no concern in the affair; but he must answer fully, though a plea to that effect would bar both discovery and relief. 1 Vesey jun. 292. But if the fact be so, there can be no decree against him. Id. An agent charged with personal fraud, must answer fully, though he disclaims all interest. 1 Anstr. 37. A discovery of a correspondence is sought, if the deft. state extracts of letters, and swear that those are the only parts of the correspondence on the subject, this is sufficient. Id. 58. So when a party refers to extracts of books of account, the parts he states to be immaterial, are left sealed up. Id. 59. A trustee not interested, and who never acted, and released, is not held to answer to frauds; and as he may be a witness. Id. 65. The answer need not state an account, where the ground on which it is prayed is denied. The bill charged dealings in pictures by commission, and the answer positively denied that there was any dealing by commission, but stated the deft. sold them to the plt. in the course of trade. 3 Vesey jun. 446, 447. A single witness cannot prevail against the deft's. positive denial. Id. 170.

Cited Coop.  
309.

§ 5. *Bill amended after answer &c. the effect;*—as by adding a deft. this gives the original deft. no right to answer the amended bill. 3 Anstr. 879. A deft., in fact only a witness, and so may plead, yet if he answer, he must answer fully. 3 Bro. C. C. 238. A bill is for a discovery only; to this the deft. pleads fine and non-claim, and the bill is amended, praying relief. The deft. cannot put in a complete answer

CH. 226. again, but he must refer to the former answer, and this last answer is to be viewed as a part of the answer to the original bill. 2 Com. D. Chan. R. 2. Must be direct and positive, not as he believes, unless the court dispense with the positive answer. Id. This will be done for special reasons, and as to matters of seven years' standing. 1 Vern. 470.

Art. 7.



Cartwright v.  
Hartley.

§ 6. *Answer's place in pleading.* It is usually after defence by demurrer, by plea, or by disclaimer; and it is a settled rule, that every part of a bill or information, not covered by demurrer, plea, or disclaimer, must be by answer; but it is not true the deft. can make, by answer, every defence he can by plea. See s. 1. Another rule, if he answer at all, he must answer fully; 1 Vesey jun. 292; see s. 4; except not to criminate himself, or to lay open a fair purchase. 2 Vesey jun. 454; and as Ch. 225, a. 6, s. 23.

Gunn v.  
Prior.

§ 7. *The nature of an answer.* The plt. being entitled to a discovery of the matters in his bill, in aid of proof, or because he has none, to enable him to get a decree, the deft. is called on to confess and avoid, or to traverse and deny, all the material parts of the bill. Wyatt's Prac. Reg. 11; cited Cooper's Pl. 313. Nor is a general denial sufficient; but the deft. must admit or deny the substance of each charge in the bill, particularly and precisely. 1 Br. Ch. Ca. 503. The deft. is "bound specifically to answer the specific charges in the bill;" and he must answer positively to each fact in his own knowledge, as each act of his own. *Secus*, he answers as to his information and belief. So he answers particularly to a combination charged in the bill. But the answer or plea must sometimes allege a fact that destroys the plt's. title, then it effectually protects the deft. from the discovery asked for. As if A file a bill as an heir, plea, denying he is, disallowed; then an answer is put in denying he is heir. This is correct, as a preliminary fact is stated that must be tried by a jury, on an issue directed; for if heir, the plt. is entitled to a discovery, otherwise not. 11 Vesey, 291. Correct, because decisive of a material fact proper to be ascertained before the parties run into tedious pleadings at large. The same if the plt. file a bill as a partner, to have an account, and the deft. swears he was only a servant. Each case is on the ground, if the deft. denies a material fact, which, if admitted, would entitle the plt. to relief, no further proceedings are to be had till such fact is settled; for if settled one way, all further proceedings are useless; and if settled the other, then further pleadings may take place. But if he do not so deny some substantive leading fact, a full answer is required; and if he answer to particular facts, he must also answer to the circumstances attending them; even a mere witness submitting

Coop. 316,  
Jacobs v.  
Goodman.—  
11 Vesey,  
283, 293.

to answer, must answer fully, 1 Vesey jun. 292; though CH. 226. he might have objected by plea or demurrer. 11 Vesey, *Art. 7.* 41, 43.

§ 8. *Form of, in modern practice.* Answer begins with its title, specifying which deft. answers, the plts. names in the cause;—of several defts. is joint, unless their titles are different. After the title, it reserves to the deft. all advantage which might be taken by exception to the bill,—on the whole, not essential. The substance of the answer follows, and is to the matters of the bill, with the interrogatories founded thereon, one after another, with such additional matter as the deft. has in his defence, either qualifying the case in the bill, or stating a new case on his own behalf. Then follows a general denial of illegal combination charged in the bill, and of all other matters therein contained; but the general traverse at the end of the answer is not essential, (but ancient form,) when it is to every clause in the bill. Cooper's Pl. 322, 327.

§ 9. An answer is always on oath, if it be not waived by the plt. But this rule cannot apply to a corporation aggregate. A Quaker's answer is on affirmation. A Jew is sworn on the Pentateuch. An alien, not understanding English, has an interpreter &c. who translates his answer after taken and engrossed, both are sworn. The oath is sometimes dispensed with, and so is the deft's. signature. 10 Ves. 442.  
—3 Br. Ch.  
Ca. 263.—3  
Ves. 601.—  
2 Anstr. 479.  
—6 Ves. 171,  
225.

§ 10. If trustees are made defts. and they admit, by their answer, the fund is in their hands, on a bill for an account of stock standing in their name, and they also admit they have received the dividends, they must state what dividends; on the principle every answer must be full and specific, except where there is a total denial of title,—as s. 7 &c. 11 Vesey, 41,  
223, 223.

§ 11. Letters referred to in an answer, generally must be produced by the deft.;—so deeds, as parts of the discovery sought for in the bill. But this general rule has its exceptions; and cases, in which extracts sworn to be the only parts of the correspondence on the subject, will do, see s. 4. 11 Vesey, 41.  
—1 Anstr. 58.

§ 12. Impertinent matter in an answer is matter stated which is irrelevant to the case made by the bill. So where the pleading is stuffed with long recitals, or with long unnecessary digressions, or where a deed or paper is stated not asked for, and not to the purpose; and it may be in the answer itself, or in a schedule annexed. The deft. in his answer, says he does not believe the plt. lost a certain bond, but concealed or destroyed it. This is scandalous when not material to the defence. Cooper's Pl. 317, 318.—  
Moseley, 45,  
69, 70.—4  
Ves. 217.

§ 13. *Exceptions to the answer,* (see s. 9,) according to Cooper, 319, are always in writing; stating the parts of the plt's. bill he alleges are not answered, and praying a further Cooper's Pl. 319, 320.

CH. 226.

Art. 7.



answer as to them. If several answers, there must be exceptions to each; and care is taken in drawing them, "that all the points of insufficiency are stated;" as after answer to them, they cannot be amended; Bunb. 246; except on a clear mistake. 10 Vesey, 284, 285. On a decision, the answer is not sufficient in any of the points excepted to, the deft. must further answer to these points. Wyatt's Prac. Reg. 28.

§ 14. If a plea or demurrer is put in without any answer, and is overruled, the plt. need not except, but the deft. answers the whole bill, as if no defence had been made. Bunb. 123. But if the plea or demurrer is accompanied by an answer to a single fact, and the plea or demurrer is overruled, the plt. must except to the answer as insufficient, and state wherein; and any impertinence in it is disposed of before its sufficiency is considered. 2 Anstr. 591. After considered, the impertinence is waived. 6 Vesey, 456, 458, 514.

§ 15. A further answer is viewed as a part of the first and follows it up. So an answer to an amended bill is viewed as a part of the answer to the original bill, therefore matter in the former is not to be repeated in the latter. 3 Atk. 303.

§ 16. Husband and wife may answer severally to a bill against them, but her answer is to no purpose if he do not answer. 2 Ca. Ch. 173. And if her answer confess that which his denies, it shall not prejudice him. 2 Ca. Ch. 39. But if he run away after appearance and no friend will be guardian, she may have leave to answer without him. Bunb. 167. Husband allowed to answer without his wife, because she declared she would not answer with him, and loved the plt. better. Id. 175. And if a husband bring a bill against his wife, she shall answer as a *feme sole*, and not by guardian; 8 Atk. 478; as then he treats her as such. And she may be made to answer as a *feme sole* where the marriage is clearly had solely to defraud creditors. Cooper, 325.

§ 17. *Answer amended.* If a deft. be surprised in his answer before replication, upon a certificate, and an affidavit of notice, may amend the mistake. Ca. Ch. 29. So an answer may be amended before issue joined. Bunb. 186. So an answer amended by the draught where the mistake was 250 or 300, for 25 or 30. Id. 295. Answer may be amended if for the plt's. benefit and deft. very old. Id. 323.

§ 18. *Answer not amended.* Not by altering the day of payment, though issue not joined. So refused to amend eighty-six for sixty-eight, where the draught and engrossment agreed. 3 Anstr. 717. Not allowed to amend an answer by striking out the admission of a fact which would deprive the

plt. of the benefit of this evidence, especially if he do not swear he was surprised into the admission, or was ill-advised in setting it forth. 3 Atk. 522. Nor be amended after an indictment for perjury preferred or threatened, or in order to avoid the indictment. 1 Brown's Ch. R. 419. In some cases the court admits a supplemental answer to be filed after replication, as on the discovery of new matter in an account. Cooper's Pl. 330.

CH. 226.  
Art. 7.

§ 19. *Exceptions to answers.* Usually in writing,—and can avail only against insufficient answers,—cannot be to an infant's answer, as he may amend when he comes of age. Bunb. 338. If a plea stand as an answer and no exception reserved, plt. cannot except. 3 P. W. 235, 239. Demurrer to part, and answer to part of the plt's. bill, he cannot except till the demurrer is argued. 3 P. W. 326. So if plea to part, and answer to part, the plt. cannot except to the answer before the plea is argued. 1 Vern. 344. *Secus*, if answer as to discovery. A plea as to relief only, plt. may except as to discovery before the plea is argued. 3 P. W. 326. If the deft. answer the plt's. exceptions fully, he cannot amend them, though he may his bill, and have an answer to that. Bunb. 246. If the cause be heard on bill and answer, the answer shall be admitted to be true in all points, and no evidence is to the contrary, but matter of record. The reason seems to be, because the deft's. answer is on oath, and not denied by the plt., as he does not reply to it, as he rests on his bill merely. Hence, if the deft. by his answer says, he believes and doubts not to prove the plt. paid, if the cause is heard on bill and answer, the plt's. bill must be dismissed; for though the deft. does not allege positively he paid the plt., yet the plt. ought to reply, otherwise the deft. is prevented of his proof. Plt. allowed to reply, paying costs. 1 Vern. 140.

And several cases, Cooper, 319, 320.

§ 20. *Disclaimer.* Deft. may demur, plead in bar, or answer, as above, and he may also disclaim. "A disclaimer is where a deft. renounces all claim to the subject of the demand made by the plt's. bill." Cooper's Pl. 309; cites Wyatt's Prac. Reg. 175. Is distinct in substance from an answer, but cannot often be put in without one, 176; for if made deft. by mistake, having had interest he may have disposed of, the plt. may require an answer sufficient to ascertain if the facts were so or not; and if so, an answer seems necessary to enable the plt. to make a proper party instead of the deft. disclaiming. Cooper, 309; 1 Anstr. 47. Deft. may demur to one part of the bill, plead to another, answer to a third, and disclaim to a fourth. And 3 P. W. 80. But must all refer to distinct, separate parts of the bill, for the after one to the same part overrules the former one to it. Cooper, 319. Disclaimer may be withdrawn for good reasons. *Id.*



CH. 226. ART. 8. *Replication, rejoinder, &c.* § 1. After answer the plt. has his election to reply to it, or to have his own bill dismissed. The replication may be general or special,—must be concise, and not scandalous,—must maintain the plt's. bill, and confess, avow, deny, or traverse the answer, and contain only matter tending to avoid the answer; nor bring to proof matter confessed in it, but only matters put in issue. But the plt. may give notice he will examine only such matter as he specifies. Where the deft. disclaims generally, the plt. must not reply; but if the deft's. plea and demurrer are allowed, the plt. may afterwards put in a general replication, and if the plt. give a special replication, the deft. may plead or demur to it. If after a bill and special replication, the deft. has a verdict at law, he may so plead it as to prevent an examination into the matter settled by the verdict. 1 Vern. 351; 3 Atk. 582; 2 Vern. 46. If there be a plea and answer both to the bill, the plt. must reply to both. 2 Vern. 46. An answer may accompany a plea to support it, and so affirmed. Cooper's Pl. 231.

§ 2. *Rejoinder.* This must maintain the answer, and traverse, confess, or avoid the replication. Plt., if necessary, may surrejoin, and the deft. rebut. Prac. Reg. in Ch. 314. After replication the deft. may rejoin *gratis*. Id.; 2 Atk. 694. But special replications and further pleadings are now but little in use, because the court generally will allow a plt. to rectify any defect or error in his bill, by amendment or supplemental bill; also, the deft. to rectify any error or supply a defect in his answer by amendment or further answer. Mitford's Pleadings in Chancery, 19; Cooper, 328, 330.

§ 3. The plt. in his replication may allow the deft's. plea, though defective in form or substance; and after the cause goes to a hearing, deft. opens, and has only to prove his plea, it is too late for the plt. to object. As where a deft. pleaded a purchase for a valuable consideration, and omitted to deny notice of the plt's. title, and the plt. replied to the plea; held, though irregular it was admitted by the replication to be good, and the fact of notice not being in issue, the deft. proving what he pleaded was entitled to have the bill dismissed. Cooper's Pl. 232; cites 3 P. W. 94, 95. And if an answer accompany a plea and the plt. except to the answer, he allows the plea. Id. The plt's. replication is his avoidance or denial of the answer or defence, and maintains his bill, to draw the matter to a direct issue. Cooper, 328.

ART. 9. *Cross bill, supplemental bill, and bill of interpleader.*

§ 1. The liberal principles of practice adopted in courts of equity, enable parties to continue and keep their suits alive in many cases in which they would fail and be defeated at

law, such as liberal amendments, cross-bills, supplemental bills, bills of revivor and of review, &c. CH. 226.  
Art. 9.

§ 2. *Cross bills.* This is in the nature of a defence by the deft., and first allowed in order that he might state his own case more to his advantage than when acting merely as a deft.; but in the cross cause introduced by the deft's. cross bill, matters settled in the former bill cannot be examined. In filing and supporting this cross bill, the deft. to all the purposes of it, acts as a plt. Several cases of cross bills have been already stated. This bill brought by the deft. against the plt. in a prior suit depending, must be brought before publication past in the other suit, except the plt. in the cross bill will go to hearing on the depositions already published. 1 Eq. Ca. Abr. 80. And if there be a bill exhibited in one court of equity there may be a cross bill in another. 1 Vern. 221. Its general object is the plt's. discovery of facts.

In several cases a party may have a bill of revivor and supplement in one bill. Cooper's Pl. 84; 214, demurrer thereto.

§ 3. *Supplemental bill,* is for new matter arising after the original bill was filed; and there must be a new service on the deft., as he has a right to defend himself against the new matter. 4 Vin. Abr. 444, pl. 10; 3 Will. R. 349. If there be no proof of the new matter the bill must be dismissed;—may be any time before a decree is signed and enrolled. 2 Atk. 177; 2 Ch. R. 142. And in a bill of review a new supplemental bill may be added. 1 Vern. 135. The plt. brought a supplemental bill for the discovery of more evidence touching a matter of account; to this the deft. pleaded the former bill, and that the cause was heard and account directed; but he was ordered to answer to all matters in this bill not answered to in the former case. 2 Ch. R. 142. It may also be filed to introduce a matter that existed prior to the original bill, or to add new parties in certain cases. Cooper's Pl. 73, 83. So after a decree. Never allowed where an amendment will answer. Cooper's Pl. 74; demurrer to, 211, 214;—pleas to, 302, 303.

§ 4. *Bill of interpleader* is one exhibited by a third person, who not knowing to whom of right he ought to render a duty, fears he may be injured by some of those who claim it of him. He, therefore prays, that they may be put to interplead, so that the court may judge to which of them the thing belongs, and he made safe on the payment; and this he may do, whether any suits be commenced against him in law or equity, or he is only in danger of being molested &c. He must make affidavit there is no collusion between him and any of the parties. If a cause has been heard on a bill of *interpleader*, and a trial at law directed to settle the right be-

Moseley's R. 378, Ward v. Eyles; and cases cited, Cooper's Pl. 84, 88.—Com. R. 630. Demurrers to, Cooper's Pl. 214; pleas to, 303.—Cooper, 85.

3 Atk. 370.—1 Ves. jr. 405, 406.—2 Ch. R. 142.—1 Eq. Ca. Abr. 80.—1 Vern. 135.—3 Atk. 110, 133, 217.—Cooper's Pl. 70, 84.—2 Vern. 237. 4 Ves. jr. 387, 388.

6 Ves. jr. 737, 744.

9 Ves. jr. 107.—13 Ves. jr. 383.—Bunb. 303.—2 Ves. jr. 310.

CH. 226. tween the defts., there is an end of the suit as to the plt. 1  
 Art. 10. Vern. 351 ; Cooper's Pl. 45 to 49.

Moseley's R.  
 88, Welsh v.  
 Fish & ux.;  
 cites 219.

ART. 10. *Bill of revivor and in nature of such bill.*

§ 1. This bill, which may be accompanied by a supplemental bill, is to revive a suit, usually by bringing into it the representatives of some party deceased *pendente lite*. As where the plt., Welsh, as mortgagor, filed a bill against Fish and his wife, executrix of the mortgagee, for an account of rents and profits and to be allowed to redeem. An account was decreed. Pending the suit Fish died, leaving a daughter who administered on his estate. The plt., Welsh, brought a bill of revivor and a supplemental bill against her and said administratrix for the discovery of assets. Said administratrix pleaded in bar of the bill of revivor, that Fish's widow was devisee of the mortgaged premises in trust for said daughter so administratrix, and that the decree could not be revived against her, as she was never made deft. in the original bill. This plea was overruled, because the suit was not revived against her in her own right, but only as administratrix of the mortgagee ; and if a new party, she was one coming into the former rights involved in the suit, *ab initio*. As to the discovery of assets, she demurred, and her demurrer was allowed, as it appeared by the bill and decree the plt. could not have any demands out of them. Cooper's Pl. 62.

§ 2. A bill of revivor does not lie against a decree. Moseley's R. 44 ; 1 Ch. Ca. 123, 174, 231 ; 2 Vern. 548. Where and how it may be demurred to, Cooper, 209, 211 ; plea to. 301, 302.

§ 3. *Where a bill of revivor is proper or not.* A decree was made against the *cestui que trust*, he died, and held the suit abated as to him, but survived as to the trustee, and he might convey, and the suit needed not to be revived. And held also, generally and clearly, "that where there were several plts. or defts., that the death of any of them made an abatement of the suit only as to themselves." But in this case, if the plts. in future should wish a conveyance of the equitable interest, they must revive against the heirs of the *cestui que trust* ; and so if any thing is to be done by the representatives of the one deceased ; and if any of the plts. refuse to revive, the rest may make those refusing defts. 1 Eq. Ca. Abr. 2, ca. 7 ; 13 Vesey jun. 164.

§ 4. *Who cannot be parties to this bill of revivor.* No one who is not in privity. Ca. Ch. 150. Hence a devisee cannot have this bill, as he is a purchaser and does not represent the testator. Id. 174. A bill of revivor pursues the original bill, and if a variance, is dismissed. Prac. Reg. in Ch. 45. And so he who revives, after revivor stands in the same condition

as his predecessor; and so this bill is bad, if it revives more than it ought. Ca. Ch. 77. Nor can a deft. revive, except in account on a decree to account. 3 Atk. 691. But Eq. Ca. Abr. 2, said deft. may revive as well as the plt. No bill of revivor where the interest survives, as among joint-tenants, joint-obligors, joint-obligees, or executors. Prac. Reg. in Ch. 47. And if a guardian to a minor sue, and, *pendente lite*, he comes of age, this bill is not necessary. Id. 48. An assignee or a purchaser cannot revive, for want of privity. 1 Vern. 283, 427; 2 Freem. R. 132. Nor can assignees of a bankrupt,—but sue an original bill. Com. R. 590. But this may be in the nature of a bill of revivor. Comyn's R. 589. Principal reason—an assignee or devisee cannot revive, as he comes into the estate by a change in the title of it, after the original bill is filed &c. The form of the bill of revivor,—and may be for a distinct part. Cooper's Pl. 69.

§ 5. *Who may revive.* If plt. or deft. die, his heir or executor &c. may revive, against the deft., his heir, or executor, &c., who has his interest. Prac. Reg. in Ch. 44. Baron and feme defts., and he dies, plt. may have this bill of revivor. Id. 46. If a feme be plt. and after answer to her bill, she marries, husband and wife ought to have this bill. Id. 47. Two executors phts. one dies, this bill lies. Ca. Ch. 77. Bill by baron and feme, and after answer he dies, she has an election to revive or not. Prac. Reg. in Ch. 47. But their suit in her right does not abate by his death. 3 Atk. 726. Nor by feme sole deft's. marrying. A creditor allowed by order to prove his debt, may revive, though not originally plt. 1 Eq. Ca. Abr. 3. Any plt. may be omitted in a bill of revivor, who was plt. in the former bill. Ca. Ch. 80. And if this bill of revivor alleges a release, by the plt. omitted, to the other phts., and prays an answer, it is no material variance. Id. A deft. who had not put in his answer may be omitted. A plt. on the abatement of a suit may have this bill or an original one at his election. 1 Vern. 463. Second assignees of a bankrupt may have a supplemental bill in the nature of a bill of revivor. 3 Atk. 218. Assignee may revive by *scire facias*, a decree enrolled as at law, but not if not signed and enrolled. 1 Eq. Ca. Abr. 3. So a devisee may bring an original bill to supply the want of privity; but in all other respects it may be a bill of revivor, and take up the case where the first bill left it. Id.; and 2 Vern. 548.

§ 6. *Subject matter of a bill of revivor &c.* If only bill and answer, and the suit abates, the executor must sue his bill of revivor within six years, or be barred. 1 Will. R. 744. No revivor, if a bill be dismissed with costs, and the person entitled to them die before they are taxed. So if taxed, no

CH. 226. revivor singly for costs. 2 Eq. Ca. Abr. 3. But Cooper, 211, Art. 10. says, the rule as to costs is only that where the party to pay them dies, and they are not taxed, there shall be no bill of revivor for them only, because a personal demand; and this is the true rule; for costs as well as damages ought to be paid whenever only a charge on property. Hence "if costs are to be paid out of an estate, the suit may be revived for them." p. 210; 10 Vesey, 572; Bun. 162; 2 Atk. 772, 812. Lies, if taxed, Cooper, 301. An administrator of a judgment creditor brought an original bill and died, and the administrator's executor brought a bill of revivor,—deemed wrong. The same plt. took administration *de bonis non* to said judgment creditor, and as such administrator brought another bill of revivor; and held well, and his first bill of revivor no bar to his second, for though both for the same matter, and both by the same person, yet they were in different rights. Said first bill dismissed with costs. Plea set aside without costs, suit revived on the said second bill of revivor. 2 Eq. Ca. Abr. 3, 4. If a part of the matter decreed, be omitted in the final decree drawn up, the proper remedy is by bill of revivor, and not by *scire facias*; *Id.* 179, 180; and to revive the part omitted in fact, though the words extended to the whole decree.

Bill in nature  
of a bill of  
revivor.

§ 7. One great object of a bill of revivor is to have the benefit of what has been done in the cause, to take it up where the death &c. left it, and so not to go over the same ground again; but this cannot be done directly where there is no privity, but may indirectly; as where he who revives brings a bill, original so far as necessary to supply the want of privity, and having done this, he then proceeds as in a bill of revivor; and in this way a devisee, or an assignee of a judgment for an annuity, has the same advantage of a decree &c. an heir or executor would have. Hence also a decree may be revived against a devisee thus by a bill in nature of a bill of revivor. 2 Vern. 672. And the decree on such mixed bill will not be longer or shorter than on the first bill. A deft. is not allowed to revive, unless he has an interest in the further prosecution of the suit. Cooper's Pl. 69.

§ 8. In what manner a suit may be revived, by plt. or deft. if a mutual account has been decreed, for each is as a plt. 1 Eq. Ca. Abr. 3, c. 5. A plt. cannot revive against two of three defts., except where the one omitted never answered. 1 Vern. 308. Plt. may revive against the husband alone, on a decree on a bill against him and his wife, administratrix, deceased, though he is not held to answer further than the estate he had with her. 2 Vern. 195.

One decree may be revived by two decrees; one as to the executor and personal estate, another as to the heir and real

Ferrers v.  
Cherry, 1 Eq.  
Ca. Abr. 4.

estate. As where the original decree for the payment of a sum of money, also for conveying lands by the deft. to the plt. and he died, decree revived as to the personalty, demurrer allowed as to the realty, as the heir was not joined. How tenants in common revive, Cooper, 301, 302. CH. 226.  
Art. 11.

§ 9. If the suit abates, the plt. may bring an original bill or a bill of revivor, at his election. 1 Vern. 463. The original bill may pray for parallel decree; the bill of revivor, to have the prior proceedings had before the decree enrolled revived; but if enrolled regularly, it is revived by *scire facias*. 1 Eq. Ca. Abr. 4. Then may be a bill of revivor on a bill of revivor. If one be deft. in the original bill, and alive, abates not as to him; so he is not to be named in the bill of revivor; but if named in that only, he may be named in each, after bill of revivor. Though after a decree is enrolled, it is usually to be revived by *scire facias*, yet as that can revive only what is in the decree, a bill of revivor is proper if other matters also, as costs after the decree is made &c. are to be included. 1 Eq. Ca. Abr. 4; Hard. 201; 2 Ch. R. 67; 1 Vern. 172. A bill of revivor is not allowed after thirty years. Ca. Ch. 216. Demurrers to bills of revivor and supplement, Cooper's Pl. 214; plea, want of proper parties, 301.

§ 10. From the vast number of cases found in the books in bills of revivor, three rules may be extracted that embrace near all of them: 1. If a party named in the bill die, and the whole interest embraced in it remains in the surviving parties, as if a joint tenant, so named, die, the suit may proceed, and no reviving is necessary: 2. If such party die, or is married, and a right in the bill vests in a third person thereby, as his executor &c. of the deceased, by operation of law, such third person must be made a party by bill of revivor: 3. But if by the death or marriage &c. of a party in a bill, a right included in it, vests in a third person by a new title, as by devise &c., such third person, if made a party at all, must be by supplemental bill; and if the case require a supplemental bill, and one of revivor is filed, the deft. may plead in bar the supplemental matter. Cooper's Pl. 302. See Cooper's  
Pl. 61 to 64,  
and cases;  
also Eq. Ca.  
Abr. &c.

#### ART. 11. *Bill of review.*

§ 1. A bill or petition for a review is not a matter of right, but of grace or favour. If there be five judges, and two are against the decree, it is no cause for a commission of review. None after five years' acquiescence;—nor any without proof of new matter &c. A decree enrolled cannot be varied by a new bill; but only by a bill of review or appeal; as the same court otherwise might make contrary decrees on the same equity. If the chancellor err in matter of law or of conscience, on a matter of fact proved before him, there may be a review Moseley's R.  
29, 35, Hill v.  
White.—See  
Ch. 198, a.  
24.

CH 226. of it. The review is usually on the old record, or the old depositions. 1 Roll. Abr. 382. But if he err in his decree on a matter of fact, this decree is final, and cannot be reviewed, as there can be no new examination of witnesses. 1 Roll. Abr. 382; 1 Vern. 166, 292, 417; 1 Eq. Ca. Abr. 81, 82; 2 Eq. Ca. Abr. 173 to 180. And the error must be on the face of the decree, or the new matters must be such as existed at the time of the decree, but discovered after; 3 P. W. 371; 2 Atk. 178; and it must be new matter to prove what was before in issue; Cooper's Pl. 91; and material, Id.; and pleas to, 303, 304.

1 Vin. Abr.  
400.—2 Vern.  
416.

§ 2. *Nature of a bill of review*;—is as a writ of error, and lies to reverse a decree founded on a mistake of the law. 1 Roll. Abr. 382, 610. So on a mistake in conscience on proof before the chancellor, 135;—or for defects in wording a decree; 2 Ca. Ch. 162;—or for want of jurisdiction in the court. 1 Vern. 292. So if the decree award to the plt. less than is due to him, or is erroneously dismissed or made against him. Ca. Ch. 53. So for error apparent in the decree. 1 Roll. Abr. 282; Ca. Ch. 54. On this bill new witnesses cannot be examined. No such examination after publication. 1 Eq. Ca. Abr. 81; 3 P. W. 371. *Quere* if this rule extends to new matter. See s. 6.

§ 3. Though a bill of review is as a writ of error in some respects, it is not in all. In some it is on broader ground. As where, if a decree is not signed and enrolled, a bill in the nature of a bill of review lies, as one will not enrol a decree against himself, to have a bill of review. 2 Atk. 40, 177. So there is a supplemental bill in the nature of a bill of review. 2 Vesey, 596. But on it there must be a petition to rehear or appeal. Id. And if the plt. bring such a bill for new matter discovered, and has none, deft. can object but by plea or demurrer, not at the hearing. 2 Atk. 40. And a bill of review may be filed on the ground of error on the face of the decree: 2. It should appear that the defts. against whom a decree is entered, had answered the bill, or stood out process of contempt; and when this is not done, a bill of review lies. 4 Hen. & M. 376, 390, Braxton v. Lee's heirs.

§ 4. *Where no bill of review lies*. Not on account of any new evidence or matter which might have been used in the first cause, then known to the party. 3 Ch. R. 76. Not but for error in law appearing on the facts stated in the decree; for if new matter be after discovered, it is assignable for error, but by leave of the court. 1 Vern. 166, 292. None lies after one is disallowed on demurrer to it. 1 Vern. 44, 417. No second bill of review; if a second, why not a third &c. 1 Vern. 135. Demurrer to this bill may be enrolled when al-

lowed. 2 Vern. 120. A decree must be performed by the party, if able, before a bill of review will be allowed. 1 Vern. 117, 264, 292. But can this rule apply to cases of errors apparent in the record? It is conceived it applies only to cases of new matter after discovered. Nor does it lie against any but those parties to the first bill. 2 Eq. C. Abr. 174; 2 Freem. R. 148. None lies on a decree correct on the face of it, though alleged it was not drawn up according to the matter proved. The proper remedy in such case is to get the cause re-heard before the decree is signed and enrolled. 2 Eq. Ca. Abr. 174. The decree enrolled is matter of record, and the facts stated in it must be taken as true, though in reality mistaken. Id. Lies not, if a matter was in issue in the former hearing, though new proof of it be found after. 2 Eq. Ca. Abr. 175. None lies, till the former decree is executed in such parts of it as does not extinguish the right, as a release &c., and if not so performed, is matter pleadable in bar. Id. On this bill of review only matter assigned for error can be objected to. Id. None lies but by leave of court, nor till money is paid, awarded to be so by the former decree, though to be refunded if it be reversed. 2 Eq. Ca. Abr. 176. None lies on account of the negligence or forgetfulness of parties, under no incapacity: nor when matters have been settled, or which might have been put in issue in the original cause. Id. True distinction. Id. And 2 Will. R. 283, 284. Leave of court must be had for this bill of review, where brought on new matter, as on a deed discovered by the plt. since the former decree; but not, if brought to reverse a decree for error appearing on the face thereof. And 4 Vin. Abr. 409, 414; 3 Will. R. 371; 3 Atk. 35; 2 Atk. 189.

§ 5. *Limitations as to time of bringing bills of review.* Though no precise time is fixed by law or practice, yet none is allowed after long acquiescence, unless the error be apparent. 1 Vern. 287, 293; 3 Atk. 26. Not after a foreclosure of an account settled some years. 2 Atk. 533. Generally no bill of review after twenty years after cause of suit accrued. This rule does not apply to contingent interests, or persons under legal disabilities. 2 Ch. R. 46; 1 Vern. 287; 2 Vern. 196; Cooper's Pl. 90, 92, 215; Ambl. 645; 1 Vern. 135. Objection is by plea. Coop. 215.

§ 6. *Who has a bill of review &c.* See above, several cases. One deft. only has it for his grievance. Hard. 50. So a plt. having but an estate or title in equity. Id. So if trustees obtain a decree, and afterwards are changed, the new as well as the old trustees may be parties to a review. Hard. 104. So where four defend for all the inhabitants of A, another inhabitant, not a party, or privy to any of the

CH. 226.

Art. 11.



CH. 226. four defts., may review. Ca. Ch. 272. But the plt. cannot have a review, because the suit abated on account of the def't's death before the decree. Ca. Ch. 122. Nor because a fact is false, for there can be no new examination after publication. Ch. 37, and above. One not privy to the first decree cannot have a review;—nor can the devisee of the plt. in the first bill. Ca. Ch. 123. Nor can one against him who is no party or privy;—nor can one who has released his equity before the decree. Ca. Ch. 107. Various principles and cases, Cooper's Pl. 88, 95. Form of the bill of review, 94, 95, 96. It must contain substantially every matter the court shall notice; but a supplemental bill may be added, if any event has happened that requires it. 1 Vern. 135. As where a new party becomes interested in the subject. Demurrers to bills of review in sundry cases, Cooper's Pl. 215, 216. Pleas to bills of review, 303, 304. If new matter is the subject of a bill of review, it is liable to any plea which would have avoided the effect of that matter, if it had been charged in the original bill. 304. Only on a final decree, and parties out of court. *Ellzey v. Lane's exrs.* 2 Hen. & M. 589; *Quarrier v. Carter*, 4 Hen. & M. 242.

ART. 12. *Decrees in equity.* A decree in equity duly enrolled, recorded, or registered, is, like a judgment, a matter of record; and, not reversed or appealed from, binds all parties to it and their privies, and the subject matter on which it is specifically made. Decrees in equity are of many kinds, as appears in the various cases above stated, and in the books. It is here intended only to notice: 1. Some general principles as to them: 2. As to injunctions: 3. As to writs *ne exeat regno* or *republica*. A bill lies to impeach a decree for fraud in obtaining it. Cooper, 96, 216.

§ 1. *General principles.* There can be no decree against one who has no concern in the matter before the court. 1 Vesey jun. 292.

§ 2. A proper decree may be made, as to levy a fine in specie, though the plt. pray for general relief only, as in *Hollis v. Carr*

§ 3. After a decree is made the plt. cannot dismiss his bill. Ca. Ch. 40. For when made it is the decision of the law pronounced by the court, is the def't's right and security in the case, and binds the plt. forever, unless duly reversed.

§ 4. A decree to establish a custom binds all persons in the same circumstances with the original defts.; if directly violated, may be revised by *scire facias*; but if evaded, a supplemental bill lies; as where a decree established a custom, that all the inhabitants of Manchester should send their corn, which was to be spent in their families, to be ground at the plt's mills. Dougl. 222, n.

§ 5. Interlocutory decree in chancery, and an appeal, the Court of Errors will decree on the merits. 1 John. R. 529. **CH. 226. Art. 12.**

§ 6. Where a chancellor is not liable for his decree, Ch. 75, a. 12, s. 19.

§ 7. Where chancery cannot refuse a writ of error, Ch. 220, a. 6, s. 3.

§ 8. On a bill to foreclose a mortgage a decree is final for the sale of the mortgaged property. 3 Cranch, 179; Ch. 188, a. 2, s. 5.

§ 9. On an interlocutory decree dissolving an injunction no error or appeal lies. 6 Cranch, 51. **Young v. Grundy.**

§ 10. If a decree be made on a sequestration in a manner irregular, the cause must be reheard. Moseley's R. 29.

§ 11. The decree must be concise, but contain the substance of the proceedings; and it may be enrolled after the death of the deft. 2 Ch. Ca. 227.

§ 12. It must recite the facts which are agreed or proved, otherwise a bill of review would be prevented. 1 Vern. 214.

§ 13. A purchaser after a decree is bound by it. 1 Vern. 459.

§ 14. So a purchaser *pendente lite*. Id.

§ 15. Not one *bonâ fide* before the bill exhibited, not a party to it.

§ 16. Nor any one who does not appear *gratis*, nor was served with process to hear judgment.

§ 17. Nor any one who has an interest, and is not party or privy. Ca. Ch. 48.

§ 18. A decree in chancery does not bind the right, but only the person. Ca. Ch. 301.

§ 19. If a decree be made against other defts. while one is in contempt to a sequestration, he is not bound by the decree, but he may afterwards appear and answer and have the cause heard. 1 Vern. 228. If a decree be not obtained by fraud, it can be altered or varied but by bill of review, or by a bill in the nature of a bill of review. Cooper, 216. And if a bill be sued to set aside a decree for fraud, and is not sufficient for that purpose, the deft. may demur to it. Id. Pleas to bills to impeach decrees for fraud, Cooper's Pl. 304. These must deny the fraud after pleading the decree, and the plea must be supported by an answer, also meeting the charges of fraud. 304.

§ 20. Appeal from the Superior Court of Chancery for R. D. Decree in the alternative to convey or pay money. Held, on a bill for specific performance of an agreement, the court ought not in lieu of such performance to decree a sum of money absolutely, but conditionally only, allowing the deft. 1 Hen. & M. 310, 329, Hook v. Ross. —Gibb. Forum Romanum, 70, 81. —1 Howard's

Exchequer Practice, 778, 800.—2 Com. D. 223.—3 P. W. 142.—3 Call, 22, 382.

CH. 226. his election to pay or perform : 2. But if he be guilty of contumacy, the court wanting evidence he ought to disclose, is not able to decree the specific performance, money may be decreed to compel him to produce it : 3. A writ of sequestration cannot be issued on the sheriff's return of "*non est inventus*," on an attachment of contempt. A sequestration had been improperly, and an inventory and possession had been taken of all Hook's estate, his lands ordered to be leased, and the rest to be sold ; to the sequestration a *supersedeas* had issued below, on Hook's giving other security. No statute provision in Virginia as to sequestrations. On this point, as on others, the proceedings were on English cases mostly ; as *Dalston v. Coatsworth*, 1 P. W. 732 ; *Cowper v. Earl Cowper*, 2 P. W. 748 ; *Hinde's Prac.* 136 ; *Pre. Ch.* 553 ; 1 Har. Ch. Prac. 254 ; 5 Bac. Abr. 259 ; *Cro. J.* 577 ; 2 Sol. Guide, 511, 512, 515 ; *Gilb. Ch.* 35, 70, 191, 192 ; 3 Call, 382, *Ross v. Colville*. A statute of Virginia empowers the Court of Chancery to appoint sergeants at arms, whose powers extend throughout the State, as the sheriff's do the counties.

ART. 13. *Injunctions.*

§ 1. Numerous are the cases in England in which writs of *injunction* have been issued, not only to stay judicial proceedings, persons leaving the country, &c., but also to stay or prevent waste, and the disposal of property in certain cases. But they have issued there in many cases never adopted here. The cases of *injunction* in the United States have been but few, and in some cases are authorized by act of Congress, as Ch. 186, a. 11, s. 12. In a general view it may be best to leave the cases of *injunctions* in the United States pretty much to time and experience. In some instances, English cases may apply very fully, in others but imperfectly, and in many others not at all ; because chancery in England in the course of centuries, as a part of the English system of jurisprudence, has acquired large powers in regard to property, judicial proceedings, and personal restraints, unknown to our constitutions, laws, and practice.

2 Dallas, 409.  
—Ch. 136, a.  
11, s. 12.


§ 2. *American cases of injunctions.* An injunction in equity was issued at the suit of the State of Georgia to stay monies in the hands of the marshal.

Ch. 193, a. 25.  
—4 Cranch,  
179, *Diggs v.*  
*Welcott.*

§ 3. The Supreme Court of the United States in this case decided, that a court of the United States could not enjoin proceedings in a State court ; and if an injunction be dissolved, error or appeal does not lie &c. 6 Cranch, 51.

1 Johns. Cas.  
417.

§ 4. An injunction was decreed and issued on the affidavit of one of the plts., stating that he verily believed, and hoped to prove, certain deeds were lost or destroyed, as stated in their bill.

§ 5. A got a judgment and received property to satisfy it; **CH. 226.** was enjoined not to proceed till he accounted for it;—also, as **Art. 13.** to injunctions. See 2 Dallas, 360, 365, 402, 415; 6 Johns.  R. 523.

§ 6. An injunction was issued to prevent the evasion of a turnpike toll. As where a turnpike corporation legally established a toll-gate, and certain persons at their own expense made a by-way for persons to avoid the toll; chancery ordered it shut up, and issued a *perpetual injunction* to prevent the said persons using it, or allowing others to use it. 1 Johns. Ch. R. 64.—See many cases cited 9 Johns. R. 507 to 562.

§ 7. So an injunction lies against a mortgagor in possession, to stay waste; and also in regard to a tenant in common. 2 Johns. Ch. R. 122, 146.

§ 8. But the court will not issue an injunction to stay waste where the plt. is in possession and has his legal remedy, except in very special cases. Johns. Ch. R. 318, 435.

§ 9. But an injunction was issued to prevent a lessee from altering a dwelling-house into a store. And generally, no injunction is issued for him who has, or had, a clear legal remedy. Johns. Ch. R. 49, Lansing v. Eddy.

§ 10. A State court has no jurisdiction to enjoin a judgment of a Circuit Court of the United States. 7 Cranch, 276.

§ 11. A final decree (case of an injunction) cannot be made, until all parties in interest are before the court. Marshall v. Beverly, 5 Wheaton, 313, 317.

*English cases of injunctions.* These are numerous in the English books, but only a few will be here noticed, and only such as are understood to be applicable to the United States or to some large portions thereof.

This writ issued to restrain the exercise of a certain employment. As where the owners of a house leased it for seventy years to A, and he expressly covenanted not to use it as a house of entertainment; but A underlet it to B, who became insane, and his wife used it as such house of entertainment much to the owners' injury. One of them filed a bill and an affidavit stating the facts, being surviving owner, and the injury, and made a motion for an injunction to restrain such business therein &c. The injunction was granted; and the chancellor said, "it is in the nature of a specific performance;" "the breach of the agreement may consist in repeated acts;"—also, this business was exposing wrongfully the lessees on their express covenant. This case in principle, is not materially different from that of Lansing v. Eddy, in New York. 5 Ves. jr. 555, Barret v. Blgrave.

So it has been decided, that sending a surveyor to mark out trees is a sufficient ground for an injunction. If after the injunction served the party disobey it, all process of contempt issues till the deft. be taken and committed on affidavit of 5 Ves. jr. 688.

CH. 226. disobedience. *Prac. Reg.* in Ch. 217. An injunction may be by parol to one present in court. *Id.* 197. Such as are not parties to a suit in equity cannot be protected by an injunction. *2 Anstr.* 553. An injunction may stay trial, or verdict, or judgment, or execution, or money levied thereon in the officer's hands. *Prac. Reg.* in Ch. 201. As has been done in American cases. An injunction is dissolved of course, without motion on overruling exceptions. *Bunb.* 30. A bankrupt brings trover against his assignees after he has acquiesced a year or more under the commission; an injunction will be granted till hearing. *2 Vesey*, 326. In admiralty proceedings an injunction is not granted to stay them, on a suggestion papers are destroyed, and an acknowledgment got by duress. *3 Atk.* 350. The court will not dissolve the injunction, if the party deft. confesses he did waste before the bill was filed, though he denies on oath he committed any after. *3 Atk.* 485. An injunction is not granted to prevent a common trespass, but will to restrain &c. when it becomes a common nuisance. *3 Atk.* 21. But only common nuisances at law are so restrained, not those feared (though reasonably deemed such.) *3 Atk.* 750. Plt. and deft. tenants in common, and both in possession, injunction refused as to waste, but allowed on affidavit of the deft's. insolvency. *3 Bro. C. C.* 621. An injunction to quiet possession is grantable only where the plt. has been in possession three years. *1 Eq. Ca. Abr.* 284; *1 Vern.* 136. Nor unless a right appear. *1 Vern.* 127; *1 Ch. Ca.* 157. Is never to be granted before a bill filed. *4 Inst.* 92. Exceptions, *2 Vern.* 401. Chancery will not grant a perpetual injunction, though the party has had five verdicts in ejectment, unless there be some fraud, or trust, or accident to give it jurisdiction. *2 Eq. Ca. Abr.* 522. Some exceptions since. *Id.* Injunction granted in the case of Gay, author of the *Sequel of the Beggar's Opera*, against publishing and selling that book, on a bill founded on 8 Anne, c. 19. *Id.*; and *4 Vin. Abr.* 278. A built part of his house on B's land and he encouraged it, then sued, and injunction to his action granted, for being a nuisance every continuance is a fresh nuisance, and so A would be perpetually liable to actions. *2 Eq. Ca. Abr.* 522. Several injunctions forbidding one to print another's book. *2 Eq. Ca. Abr.* 523; *4 Vin. Abr.* 278; *2 Bl. Com.* 406, 407; *2 Atk.* 143, 341. Whenever the deft. has his proper defence at law, chancery will not let him have an injunction. *2 Eq. Ca. Abr.* 524. Otherwise if he have matter in defence, he can avail himself of but in equity. *Id.* Perpetual injunction to the plt. not to sue on a bill of exchange legally discharged at Leghorn. *Id.* 525. Granted to stay waste by devisee in trust. *Id.* 528. Injunction from further digging a ditch. *1 Vesey jun.* 140. Gen-

erally no injunction till hearing, unless a ground for it in the answer; but as to waste, patents, and irreparable mischiefs granted on affidavit after answer. 1 Vesey jun. 430. Chancery will not grant an injunction in favour of an executor against a creditor proceeding at law. 4 Vesey jun. 638. Granted to prevent converting old houses in London to purposes dangerous to the public. 5 Vesey jun. 129. If the plt. be hung up a year by injunction, he must have a *scire facias* before execution. 1 Stra. 301, *Winter v. Lightbound*. CH. 226.  
Art. 14.

So if a party gain by fraud or any unfair means any undue advantage of another, and is proceeding at law to avail himself thereof, equity will interpose and restrain the proceedings; as if he fraudulently obtain a deed, or without consideration, or for an inadequate consideration or other deed than intended. Cooper's Pl. 139, 141; cites *Redesdale &c.*; and 1 Burr, 396; 4 Inst. 64; 3 Lev. 36.

So chancery issues injunctions in many cases to prevent irreparable injury or mischief to the plt., as in various cases of waste. See the cases, Cooper's Pl. 149 to 157. So as to many trespasses. Id. So as to the acts of copartners, and copy-rights, and patents of inventions, &c. Id. So as to a multiplicity of lawsuits. Cooper's Pl. 157, 158, &c. In these numerous cases it is material to observe, that, though the plt. generally must state and shew a title to the thing he claims in his bill, yet it is not the modern practice to require him to establish his title at law before he brings his bill. In this respect the modern is much more liberal than the ancient practice.

ART. 14. *Ne exeat regno or republica.*

§ 1. *General principles.* This writ is specially authorized by the judiciary act, as stated Ch. 186, a. 11, s. 12, in certain cases. But this statute provision, it is conceived, does not exclude this writ in chancery cases generally; but our courts may issue it in suitable cases, on the general principles recognised in chancery proceedings in England applicable to our situation.

This writ is used in England as well as in the United States, to secure the deft. to answer demands against him; but as it restrains him of his liberty, in some measure, it ought not to issue, but upon good evidence, and for substantial reasons; therefore the affidavit made to obtain it must be positive, and fairly, honestly, and understandingly made. 5 Vesey jun. 9. And if not so, the court will discharge him, though it will require of him security to abide the decree. Id. See a. 5, s. 32.

§ 2. *Cases, American.* This writ, *ne exeat republica*, cannot be granted for a debt due and recoverable at law, as in 2 Johns. Ch.  
R. 364, 441.

CH. 226. that case the creditor may take its legal steps to secure it ;  
 Art. 14. but it issues only where an equitable demand exists, and is  
 actually due to one. So it was issued in cases of suits for an  
 alien, on a wife's petition and affidavit, to prevent the husband's  
 leaving the State of New York. This is a process issued by  
 chancery courts, in several other cases, as in matters of ac-  
 count, to prevent the debtor's leaving the State, with his bail,  
 who has sold his property, though sued at law. This is consist-  
 ent with the general rule, where the reason for this writ arises  
 after the action is commenced without sufficient bail or attach-  
 ment, or where the bail is also about to leave the State.

§ 3. *English cases applicable in our practice.* Accounts are  
 a proper subject for this writ. And it has been decided that a  
 general affidavit of the belief of the debt's intentions to quit  
 the kingdom is sufficient, without stating the circumstances on  
 which the belief is founded. 5 Vesey jun. 96. The English  
 practice usually is not to serve any subpoena, but this writ, *ne  
 exeat &c.* is served personally on the party, and then he is  
 bound to appear, and put in his answer ; then he may apply  
 to supersede the writ. 5 Vesey jun. 96. Must be sufficient  
 grounds shewn. 5 Vesey jun. 591. At common law every  
 one might go out of the realm, as he pleased. F. N. B. 85  
 a, 192. Admitted this writ has ever been granted for  
 special reasons, though but rarely to prevent particular persons  
 departing the realm, as the king ever has had a right to his  
 services to defend it. F. N. B. 192, 8th edition ; and Dyer,  
 176, 189. This writ may be directed to the party or to the  
 sheriff. F. N. B. 193. Form of it to the party, Id. Was  
 originally a state writ issuing out of chancery, on application  
 from the secretaries of state, without shewing cause ; but after-  
 wards it was extended to many purposes. 2 Com. D. Chan.  
 4 B. Issues to prevent the *exeat* of a debtor. Id. But the  
 affidavit to obtain it must say the debt. is indebted, but also  
 state the facts on which the debt arises ; and if against an  
 administrator, it must swear to a belief of assets in his hands.  
 2 Vesey, 489 ; 3 Atk. 501. Debt must be made certain,  
 and appear to the court to be due. 1 Atk. 521. Ought not  
 to be granted when the debt is entirely at law. Id. Never  
 granted where there is not a mere equitable demand. 2 Atk.  
 210. Not granted without oath. Skm. 136. And must be  
 for a particular cause. 4 Mod. 179. Must be probable the  
 party means to abscond. 3 Bro. C. C. 370. Is usually dis-  
 charged on his giving security as to the demand on him. 1  
 Vesey jun. 96 ; 3 Bro. C. C. 218, 370, 427, 476. May be  
 to a female, or to a *feme covert* executrix. Ca. Ch. 116. May  
 be not to go to Scotland, as Scotland is not within the process  
 of the English courts. 1 P. W. 263.

Form of the  
 writ, and  
 where it lies,  
 Bohun, 72,  
 76.

The wife may apply for this writ against her husband, but it cannot issue on her affidavit alone. 1 Vesey jun. 4; 5 R. CH. 226.  
 II. c. 2. By this act the government may restrain by proclamation &c. (Not adopted in Carolina.) Art. 15.

§ 5. A bill to execute a decree is sometimes necessary. As where the plt. neglects the execution till embarrassed by subsequent events. And it may also be brought by one not a party, nor claiming under a party to the original decree; but claims in a similar interest, or is not able to obtain the determination of his own rights till the decree is carried into execution; or by or against one claiming as assignee of a party. So by and against purchasers under the parties, bound by the decree. 2 Vesey jun. 165.  
 Cooper's Pl. 99. And if an inferior court of equity has not jurisdiction to execute its decree, it may be done on this bill in a higher court; as where a deft. removes out of the jurisdiction of the inferior court, but is within the reach of the superior. Id. 99, 100. It is said that this bill is in some cases an original bill, and in some in the nature of one. In some is a bill of revivor or supplemental bill, or both; and the form varies accordingly. Id. And if a plt. file this bill, and has no right or interest in the subject matter, and such fact does appear in the bill so as to be a ground of demurrer, this matter the deft. may plead. 305.

ART. 15. *Practice in equity.* This, of late years, has become an article of considerable importance in classing and arranging law matters. We find little or nothing under this head in the old books; and even in Bacon's Abridgment, and Comyn's Digest, the word is not to be found in the index of either. This classing of certain cases under the head of practice, seems to have crept into use a few years before the American revolution, and of late years includes a large portion of all the adjudged cases in law and equity. See Ch. 194, practice in law courts mostly.

§ 1. *American cases.* In this complex case many matters will be seen, very useful, as shewing chancery proceedings, partly summary and partly by jury, in our Circuit Courts of the United States, in which all chancery suits are new, in most parts of American practice. The case. Before the year 1772, John Rae and John Sommerville, partners in trade in Georgia, became indebted to Stead, a British creditor, in the sum of £3864 sterling, on account. They, while living, divided their supposed profits in trade, and each drew out a large part of their joint funds, and invested his said part in lands and negroes, to his separate use. This should not have been done before their debts were paid. Rae died in 1772, intestate, and Sommerville, surviving partner, died in 1773, having made Edward Telfair his executor, and leaving a large real and personal estate. Rae left £9014. 5s. sterling in personal 2 Cranch, 406, 418, Telfair & al. executors v. Stead's ex-executors.



CH. 226. estate, partly purchased by monies so drawn from the joint fund. The same came into the hands of his three administrators, viz. said Sommerville, Samuel Elbert, and Robert Rae, all of whom were deceased before this suit was commenced. Telfair, as executor of said Sommerville, who was so administrator of Rae, got possession of a large part of his estate, part of it so purchased. On the death of Robert Rae so administrator, his wife Rebecca, (married to Samuel Hammond,) his executrix, got possession of a large part of said John Rae's estate, so purchased, with said joint funds. On Samuel Elbert's death, the last surviving administrator of Robert Rae, Samuel Elbert's executors, viz. Elizabeth Elbert, William Stephens, and Joseph Habersham, got possession of part of said John Rae's estate, so purchased. Habersham, as legatee of Jane Sommerville, daughter of said John Rae, got possession of a large personal estate, liable to the complainants' claims, who were said Stead's executors. Administration *de bonis non* was granted of the estate of John Rae to John Cobbison and wife, and part of his estate so purchased, came to their hands. James Rae, deceased, a legatee of said Jane, got possession of an estate liable to said claim, come to the hands of his administrators, the said Cobbison and wife.

The complainants in their bill in equity, charged that the defts. had wasted or misapplied the property liable to their said claim, and sought a discovery against each of them of assets and funds, but did not ask for any specific relief; their object was to avail themselves of said property, so liable, in all its numerous ramifications in so many different hands.

The defts. answered separately. The answer of Cobbison and wife admitted they held 600 acres of land, part of said John Rae's estate, but that they did not know with what money it was purchased; also £348. 2s. 4d. in personal estate. Said Hammond and wife, Habersham, and Stevens, demurred to the bill, for two causes stated. Also they pleaded a former recovery at law, in 1775, by Stead himself, against said Telfair in bar. The numerous other defts., according to their respective interests, pleaded, or confessed, or denied facts, claimed a right to retain, or to be allowed for losses, by paper money &c. as they understood their several cases. April 30, 1794, the Circuit Court overruled the demurrer. November 15, 1794, adjudged no such record of a former recovery existed, and appointed auditors to find the balance due to the complainants. Their report being set aside, as imperfect, the clerk was directed to ascertain the said balance, and an issue was directed to ascertain the damages. On the verdict returned, it was decreed, May 5, 1795, that £3634. 14s. 7d. sterling, with interest at 5 per cent. per annum, from January

1, 1774, to this day, (deducting interest from April 19, 1775, CH. 226. to September 3, 1783,) be paid to the complainants, with 5 Art. 15. per cent. on principal and interest, for expenses in remitting said amount to Great Britain, where contracted to be paid; and that the partnership property admitted by the defts. to be in their hands, be first applied towards discharging the complainants' said demand; that several lots of land belonging to the said John Rae and John Sommerville, copartners, referred to in the defts.'s answers, be sold at auction by the marshal of the court, (on a day named,) for cash, on notice specified. After sundry sales, the balance due was \$11,196. November 15, 1796, another decree was made to sell more lots; and sundry negroes named at auction &c. in like manner; and that certain *choses in action*, named, be delivered to the complainants with proper powers to collect them; and account &c. May 2, 1797, the complainants were allowed, by supplemental bill, to add a new debt. November 17, 1797, decreed several other lots be sold in like manner that belonged to the estate of said John Rae. May 2, 1799, a decree was made, on the said supplemental bill, against the said new debt., and on hearing and argument, that a pretended conveyance of 450 acres pleaded, be set aside, and that the same be so sold; also, that certain other negroes named, be sold, in the possession of Samuel Elbert's executors; that the marshal pay to the complainants the proceeds of the sales ordered towards their balance specified. May 28, 1800, decreed that £348. 2s. 4d. assets in the hands of the said Ann Cobbison, as by her answer, be paid by her in ninety days to them.

From these decrees the defts. appealed, and assigned fourteen errors, involved in substance in the remarks below. The cause was argued February 1803, by Key, for the complainants;—no counsel appeared for the defts. Decrees affirmed.

*Remarks.* On this case it may be observed: 1. That it was not deemed necessary for executors to set forth their letters testamentary: 2. That they may seek a discovery of assets in equity, though they have an action at law: 3. That it is no bar to such discovery, if a judgment at law has been recovered by the creditor against the debtor's executors: 4. That if the assets in the hands of the defts. in a suit in equity are more than sufficient to pay the plt's. debt, then the court may apportion the amount to be paid among the defts.; *secus* if insufficient: 5. That it was no error to make a decree in pounds, shillings, and pence sterling: 6. That it was no error in not making the heirs of the deceased debtor a party to the bill: 7. A jury was impannelled, and properly, to assess the damages: 8. The court directly ordered real and personal estate to be sold at auction to satisfy a debt, but only such

CH. 226. estate as by the confessions of the defts. appeared liable : 9.  
 Art. 16. The Supreme Court of the United States received information as to the construction given by the courts of Georgia to the statute of 5 Geo. II. making lands in the Colonies liable for the payment of debt : 10. That the judges tried all matters in the suit without a jury, except assessing damages, lying only in a jury's discretion : 11. The court proceeding in equity gave a specific remedy, though not asked for : 12. This court proceeded against the deceased debtors' joint funds, though divided and invested by each partner to his sole use in lands and negroes many years before the suit, and ordered these lands and negroes to be sold to pay their debts : 13. Though these were purchased in part with monies not taken from said joint funds : 14. No proceedings against the persons of the defts. : 15. The defts. classed themselves in their answers according to the situation of the property &c. respectively held by them and their titles : 16. Not assets enough being found in the hands of the defts. at first sued, the complainants were allowed by supplemental bill to add a new deft. : 17. The court from time to time decreed and ordered sales as best suited the nature of the case : 18. The court ascertained balances by auditors, and also by its clerk : 19. Interest was deducted in equity during the American revolutionary war : 20. The court charged the debtors' estates with the expenses of remittance : 21. *Choses in action* were delivered to the complainants to collect towards their debt and to account. In several of these matters it will be observed, the court accommodated its proceeding to circumstances as far as any chancery court in England can, and further than referees can. See case, *Stead's executors v. Course*, Ch. 119, a. 1, s. 6.

§ 2. In several cases our practice in equity is stated in connexion with other matters ; as *Graves v. Boston Marine Insurance Company*, Ch. 40, a. 28, s. 13 ; Ch. 225, a. 7 ; *Rieley v. Lamar & al.*, Ch. 194, a. 2, s. 25 ; *Bodley v. Taylor*, Ch. 226, a. 6, s. 20 ; *Harrison v. Sterry & al.*, Ch. 18, a. 3, s. 24 ; *Field v. Holland*, Ch. 165, a. 2, s. 3 ; Ch. 182, a. 14, &c.

1 Hen. & M.  
10, Bachelidor  
v. Elliot's  
admsrs.

On general American principles a creditor cannot sue in equity when he has a remedy at law, as *assumpsit* for work and labour ; also practice in equity will be seen in almost all the cases before stated in this and the preceding chapter.

7 Cranch,  
202, Wilson  
v. Koontz.

§ 3. An appeal from the decree of the Circuit Court for the District of Columbia. Held, the deft. to an attachment in chancery in Virginia may plead the statute of limitations, without an answer and denial of the debt or averment it is paid. If this be a valid objection it should have been sooner

taken. Not good in this case, "which is really a case at law as between the present parties." If "really a case at law," how was it sustained in equity, considering the said 16th section of the judiciary act? CH. 226.  
Art. 15.

§ 4. Error in a suit in equity; and held the Circuit Court for the district of East Tennessee, as a court of equity, cannot issue a writ of possession to enforce its decree. 7 Cranch,  
602, Wallen  
v. Williams.

§ 5. *Title quieted in equity under Virginia laws.* Appeal from the Circuit Court, sitting at Alexandria, as a court of equity. In 1806, Pendleton, plt. in that court, filed his bill to be quieted in the title of eighty three acres of land contiguous to the town of Alexandria, possessed by him and those under whom he claimed above fifty years, deducting eight years and a hundred and thirty-six days for the revolutionary war. Held, 1. If a case be clear, a court of equity will interpose, otherwise not, but leave the parties at law: 2. A purchaser with notice is protected by his vendor's want of notice: 3. An adverse possession of fifty years, though with knowledge of a better title, is valid against it: 4. A purchaser without notice has a right to join his adverse possession to the ostensible or apparent adverse possession of his vendor so as to avail himself of the statute of limitations; the possession of Pendleton and those under whom he claimed had been to a line north six west; the other party urged it should have been to a line north, seventeen west, on which last construction the 400 acres originally granted, would not have extended so far down the Potomac towards the town of Alexandria: 5. By the laws of Virginia governing this case a possession of thirty years under some circumstances, and of fifty years under any, constitutes a title against all the world: 6. The purchaser is not bound to know that a private parol agreement exists, which may make the vendor's right of possession vary from his visible possession; therefore, a private parol trust in the vendor, unknown to the purchaser, does not pass to him any more than any other secret trust does: 7. A suit not prosecuted to a decree or judgment is not constructive notice to a person not a *pendente lite* purchaser: 8. Where a suit terminates by abatement and is not revived, it takes no time out of the act of limitations. Doubts hanging over Pendleton's title must be removed by a decree in equity quieting it. In this case proceedings in equity and chancery in Virginia appeared as far back as the year 1741. 8 Cranch,  
462, Alexan-  
der & al. v.  
Pendleton.

§ 6. Appeal from a decree of the Circuit Court for the Virginia District in a suit in chancery brought by the trustees for the creditors of William B. Magruder & Co. against Drummond's administrators, to compel them to account for funds put into the hands of their intestate by William B. Ma- 9 Cranch,  
122, Drum-  
mond's  
adms. v. Ma-  
gruder & Co's  
trustees.

**CH. 226.** *gruder & Co.* The defts. in their answer below, denied the firm of *Magruder & Co.*, saying they knew no such copartnership, and put them to prove it, so denied the deed of trust &c. in the bill, and put them to prove it; also answered, that the funds put into his hands by *Magruder* were for paying, and only sufficient to pay their intestate. Held, the court above will not presume that any, or other proof of matter so denied was made than appears in the case sent up: 2 The clerk of the court's certificate of a copy of a deed must have the presiding judge's certificate, that the clerk's attestation is in due form: 3. If the Supreme Court reverse a decree on a technical objection, it does not dismiss the bill absolutely, but will remand the cause for further proceedings, though objected the *plts.* below, had no equitable claim to new proof, as they claimed for favoured creditors, &c.

**9 Cranch,**  
153, 164,  
Clark's exec-  
utors v. Van  
Riemsdyk.

§ 7. Appeal from a decree of the Circuit Court in Rhode Island on a bill filed by *Riemsdyk* to obtain payment of the amount of a certain bill of exchange, drawn at Batavia by the debt's. supercargo on a house in Holland, in favour of the *plt.*, to repay him for advances he made to the use of the defts. Three of the defts. were discharged insolvents, and their answers admitted the grounds of the *plt's.* demand; but the fourth, *John Innes Clark*, was solvent, and died, making his executors, joined in the bill. In point of practice, held 1. The solvent partner's executors were not bound by the answer of their said co-defts.: 2. Nor were their depositions, though so discharged, evidence against said executors, as the debt in question was contracted in a foreign country: 3. When the *plt.* in his bill calls on the debt. to answer, the *plt.* admits the debt's answer to be evidence and equal to that of one witness; then the *plt.* to turn the balance in his favour must have other evidence besides one witness: 4. But there may be circumstances affording stronger evidence than the testimony of any one witness, especially as to a fact not within his personal knowledge: 5. If an executor in his answer denies his testator gave an authority to one to bind him, such an answer to an averment in the *plt's.* bill of such authority, does not deprive him of his remedy, unless such answer also deny the testator's after assent, as this is as his prior assent: 6. When a man speaks of a matter not within his knowledge in the nature of things, he ought to speak only of his belief, and if he affirm of his knowledge, it makes no difference as to the real weight of his assertion or testimony.

**9 Cranch,**  
372, 374,  
Gettings v.  
Burch's  
admr.

§ 8. But it is error to decide contrary to an answer, if not contradicted by evidence or denied by replication. Held, on an appeal from the sentence of the Circuit Court for the District of Columbia, affirming that of the Orphan's Court for the

county of Washington. The petition or libel called on Gettings to deliver up five negroes &c., his answer was, he had sold them and was ready to account &c. ; it did not appear by the record, that any formal replication was filed in writing to this answer ; nor did the record shew what evidence was before the Orphan's Court. Held, that on this state of the case the decree below, that Gettings should deliver up the negroes, was erroneous, as there was nothing in the record to justify a decision contrary to his answer.

CH. 226.  
Art. 15.

§ 9. Several suits in chancery in the Circuit Court for the county of Washington in the District of Columbia : 1. The court held, that if a contract for the sale of land has been partly executed by the vendor, and he is unable to convey all the land, equity decrees him to repay a just proportion of the purchase money with interest : 2. A fact stated in a deft's answer must be taken as true, where not contradicted by evidence : 3. The court will not decree a specific performance, where it has become impossible for it to answer the purposes of justice or of the parties : 4. Equity may order an issue *quantum damnificatus* ; but will not in any case in which there is a simple, equitable, and precise rule to ascertain the amount it ought to decree, (as in this case repayment &c., as 1st above :) 5. An equity of redemption could be sold on execution and could be attached : 6. The highest court in Maryland settled this point as to the case conclusively, though not as to the law generally : 7. If a statute subject an interest to attachment, judgment, and execution in the law courts, it gives them an implied power to fashion their mode of execution to the nature of the case : 8. If one take a deed of, and pays for city lots, and includes therein, by mistake, alley ground, he does not acquire a title in fee to such alley ground, but may therefor recover back in equity, a due proportion of the purchase money paid : 9. If A, B, and C, mortgage their joint property to D, to secure a demand against them, and each agrees to pay his third part, and A is obliged to pay all, and requests D not to release the mortgage, but to hold it for A's benefit, hereby a lien in equity is created on the mortgaged premises to the amount of B and C's parts of the demand : 10. The court so modified its several decrees as to do equity and justice among all parties concerned. The time of conveyance is not *per se* of the essence of the contract.

9 Cranch,  
457 to 602,  
Pratt & al. v.  
Law & al. ;  
and three  
other cases.  
Decrees  
made in three  
causes.

See also 6  
Wheat. 523,  
Brashier v.  
Gratz & al.

§ 10. *What is undue concealment in equity or not.* Error to the District Court of the District of Louisiana. Organ filed his libel below, and stated that February 18, 1815, he bought of said Laidlaw & Co. 111 hhds. of tobacco, which by them were delivered to him, and he was in lawful possession thereof &c. when, February 20, they forcibly took it from him, and held it,

2 Wheaton's  
R. 178, Laid-  
law & al. v.  
Organ in er-  
ror.

CH. 226. though he was ready to perform every thing on his part &c.,  
 Art. 15. and had tendered to them bills of exchange for the price &c.  
 according to contract,—prayed for citation to them, and for judgment for his damages &c., and for a writ of sequestration of said tobacco, to place it in the marshal's hands, to abide the decree, and it being finally adjudged to him &c.—general relief &c. February 21, citation to them, and said writ issued, and thereon the marshal took said tobacco into his possession. March 2, 1815, after a hearing, Organ was ordered to give bond in \$1000 to them, to indemnify them for the loss they might sustain by the sequestration. March 22, 1815, defts. answered, and disclaimed all ownership in the tobacco. Same day Boorman and Johnston filed a bill of interpleader or intervention, claiming it as theirs, and praying to be admitted to defend, and to have it restored to them &c. April 20, 1815, a jury found for the plt., Organ, for the tobacco, without damages, payable as by contract. Judgment accordingly, with costs, and order to the marshal to deliver it to him &c. on his depositing in court his bills of exchange for the amount &c. for defts. use. April 29, 1815, Laidlaw & Co. filed their bill of exceptions, because the court rejected as a witness Gerault, one of the company of Laidlaw & Co.; reasons stated &c., and because, as alleged, Organ knew of the peace of Ghent, and concealed his knowledge of it, when he made the bargain, of which the sellers were ignorant; and this news &c. raised the price 30 to 50 per cent. &c. The fact was, Organ had heard of the peace when he closed the bargain, and was silent as to this, and the defts., the sellers, had not heard of it. They urged that this silence or concealment was inequitable, and defeated the contract; and cited 1 Comyn on Contracts, 38; and Pothier de Vente, Nos. 233 to 241; and Cicero, lib. 3, de Off. was inclined against such silence. But our Supreme Court of the United States held, 1. That Organ was not bound, in equity, to communicate the intelligence he had exclusively of such extrinsic circumstances, which might influence the price &c.; the means of intelligence were equally, as observed, accessible to both parties: 2. The judge below was in an error, in absolutely instructing the jury to find for the plt. below, but should have left to them to find whether any imposition was practised by him on the vendors.

§ 11. This intervention, in this case was according to general practice in equity, somewhat of the nature of interpleader, explained above; and is when a third party applies to the court below, or above, any time before the cause is fixed for hearing, to be admitted to prosecute jointly with plt. or deft.; it may take place wherever a combination of interests may jus-

tify on reasonable grounds such coming into the suit of such new party. It will be observed, that Laidlaw & Co. remained a party in the suit, though they disclaimed, and the interpleaders claimed the property in controversy.

CH. 226.  
Art. 15.

§ 12. *Sequestration in proceedings in equity*,—is a very common part of chancery process; and as above it is nothing more or less than a writ issued by a court sitting in equity, to the proper officer, commanding him to seize and take some specified property, real or personal, or some person, into his possession and custody, and hold the same till further order, or at least till security be given to answer the purpose for which the same is seized and taken;—was derived from the civil law. A writ of sequestration in chancery proceedings issues for several purposes:—to compel a party to appear in court and answer, then it often follows a subpoena and an attachment. In this case, on this writ of sequestration, the court directs the officer to seize and take into his possession the party's estate, real and personal, or some part thereof, as the case may require; and if he be contumacious, this process will proceed to the improvement of the property sequestered, keeping an account, by the sequestrators, or proper officer, of the rents and profits. And in *Shaw v. Wright*, the court of chancery also ordered the perishable articles, rents paid in kind, or the natural produce of a farm under sequestration, to be sold. This was on a bill for an account, taken *pro confesso*, against surviving executor and devisee in trust, and leasehold estates taken under a sequestration, for want of an answer. The court would not order the sequestrators to sell, as there was a difficulty as to a warranty of a title to the purchaser, but directed them to apply the profits; but said that the appointment of a receiver in the place of the sequestrators, discharges the sequestration; and where a decree is made against the party, *pro confesso*, neglecting to answer, to pay monies, the monies so raised will be applied to satisfy the decree. All this seems to be of necessity; for the sequestration once commenced, must be followed up to answer the end intended. And this case is an authority for a sale. And in *Wilcox v. Wilcox*, Lord Hardwicke refused to discharge the sequestration, and kept it alive to compel the debt to perform the decree, the bill being taken *pro confesso*. Amb. 421; cited 3 Ves. jun. 23. As to selling sequestered property, the chancellor, in *Shaw v. Wright*, said, "You will not find any instance of an order to sell under a sequestration, a subject which passes by *title*, and not by *delivery*."

3 Vesey jun.  
22, Shaw v.  
Wright.

3 Atk. 466,  
Maynard v.  
Pomfret.—  
Wilcox v.  
Wilcox; and  
2 Vern. 558.

§ 13. Sequestrations that issue on mesne process, are discontinued by the party's death. 1 Vern. 58. And sequestra-

1 Eq. Ca.  
Abr. 352.—  
2 Eq. Ca.  
D. 7, Y. 4.

Abr. 710; many cases cited 2 Com. D. Chan.



CH. 226. tors on mesne process, are accountable for all the profits, and  
 Art. 15. can retain only so far as to satisfy for the contempt. 1 Vern.

248. But where a sequestration issues on a decree, and to compel the execution of it, there, though the same be for a personal duty, it is not determined by the party's death. 1 Vern. 58, 118, 166. Sequestration binds from the time it is awarded ; and the party who takes it out is not answerable for the sequestrators' acts, for they are officers of the court ; as if they have power to fell timber, and they do it, to the amount of £7000, and bring only £2000 into the account. 1 Vern. 160, 161. If a deft. be in contempt, and in prison for not performing a decree, the court will order a sequestration against his real and personal estate. 2 Ch. R. 151 ; 1 Vern. 344, 421 ; 2 Vern. 217 ; Comyns' R. 712 ; 2 Will R. 621. In several cases chancery issues this writ of sequestration in order to take the thing in dispute into the court's custody by its proper officer, in order to prevent its being put out of the way, and to hold it subject to the court's decree in the case, as was done in *Organ v. Laidlaw & al.* above. It is in principle such kind of process as issues in admiralty cases *in rem*, and in cases of seizure, (Ch. 224 ;) the real object in all which is to keep the thing in controversy within the power of the court.

*Cheshire v. v. Atkinson, 1 Hen. & M. 562.* *Supersedeas.* The court of appeals will not grant this writ to stay proceedings on a judgment of a county court ; this belongs to the superior courts of law and equity.

7 Cranch, 1. § 14. *Rehearing.* The court will not rehear a cause after the term in which it has been decided. Held, on a motion grounded on a statement of facts filed, only two counsel of a side can be heard in any case. A rehearing is the proper mode of impeaching a decree, not signed and enrolled, for error ; and two days' notice is sufficient for a rehearing. 1 Vesey jun. 45 ; and Cooper's Pl. 93.

2 Eq. Ca. All depositions taken in a cause, though not read at the hearing, may be read at the rehearing. And Select Cases in Ch. 21. Abr. 491, e. 9 ; 491, c. 1 ; and 4, c. 5. But in another case held no proof is to be read at a rehearing that was not read at the hearing. Vin. Abr. tit. Rehearing, ca. 5. 4 Br. Ch. Ca. 441.—3 Atk. On the plt's. petition to rehear, the cause is open as to every part of it, as to the deft. ; but as to the plt. it is open only as to those parts of it he complains of in his petition. 1 Will. R. 300. 811.—2 Atk. It is in the court's discretion to grant a rehearing or not ; 3 Will. R. 8 ; and so if it will do any thing thereon. Id. On a new bill to carry a decree into execution, the court may vary and alter what is thought proper, but on a rehearing no further than the petition extends ; but if it be against the decree in general, though particular reasons are given. the whole is open, but otherwise, if the petition be only against one or two

particulars. Select Cases in Chan. 13. Only so much of the case is open on a rehearing, as is petitioned against. Id. 24. Rule, no rehearing to be granted in future, unless applied for within six months after pronouncing the decree. Bunb. R. 309. Must be an affidavit of facts, as in cases of review. Cooper, 93, 94. CH. 226.  
Art. 15.

§ 15. *Time of rehearing.* Not till the decree is drawn up, Bunb. 184; but usually must be before it is enrolled. Pract. Reg. in Ch. 311; 2 Vent. 359. Except where the enrolment is irregular, or by surprise. 1 Vern. 131; 1 Vesey, 205. No rehearing after a decree by consent. 1 Anstr. 81. 2 Com. D.  
Chan. Y 5.

§ 16. *Case of an award.* Appeal from the Circuit Court of Columbia, sitting in chancery, and had set aside an award, and directed an account: 1. The arbitrators were made a party to the suit in chancery, brought to set the award aside: 2. Not set aside if they omit to act on a part of the matter submitted, if the plt. in chancery does not show he is injured by such omission: 3. When only the *price* of land, and not the *title* of it is submitted, neither the submission nor award need be by deed. 7 Cranch,  
171, Davy's  
exrs. v. Faw.

§ 17. *Case at law, not in equity.* As if the assured misrepresent the age and tonnage of his ship, whereby the insurers are induced to over-value her, and this amounts to a defence, it is a defence in an action at common law, and not in equity, the policy being a valid one. Decided on an appeal from a decree in chancery. 7 Cranch,  
332, Alexan-  
dria Marine  
Ins Co. v.  
Hodgson.

§ 18. Error to the Circuit Court, Tennessee, to reverse a decree in chancery. This court had issued a writ of possession to enforce a decree. The writ of error was too late to be a *superseas* to the decree. Held, this court will not quash this execution, as the writ of error itself is not a *superseas* to the decree. 7 Cranch,  
278, Wallen  
v. Williams.

§ 19. Appeal from a decree of the Circuit Court of the District of Columbia in a suit in chancery, brought by Lee against Thomas Munroe, superintendant of the city of Washington, and William Thornton, the survivor of the late board of commissioners for that city. The object of the bill was to obtain a discount of \$3000 on a judgment, which Munroe, as superintendant, had obtained against Lee, on his bond, on a ground of set-off, Lee claimed on the score of city lots. The points decided were: 1. The declarations of an agent of the United States do not bind them, founded on a mistake of fact, unless he clearly is acting within his authority: 2. It must appear he was in his capacity of agent, clearly empowered to make such declarations. Was viewed as a suit, in fact, against the United States, for a mistake of their officers in a representation made by them to Lee, occasioning, as he said, the loss 7 Cranch,  
366, Lee v.  
Munroe & al,

CH. 226. he stated in his bill. These officers being mistaken, thought  
 Art. 15. Morris & Nicholson had city lots due to them, and told Lee, if he obtained their order they would convey to him certain lots, value \$3000; but these officers had no power from the United States to make such offer; if they acted fraudulently they might be personally liable to damages. Decree affirmed.

2 Wheat. R.  
 390, 394,  
 Union Bank  
 v. Laird, in  
 error.

§ 20. Laird's suit in chancery to compel the bank to transfer fifty shares to him he had purchased. Bank's and creditor's lien thereon allowed. Held, a creditor may take and hold several securities from his joint-debtors, and each and all of them till his debt is paid; and equity will not compel him to yield up either, till his debt is wholly paid; nor if the law gives him one of them. As where the charter made a stockholder's shares liable for all his debts due and payable to the bank; while the stockholder, Patton, was so indebted to the bank, he sold his said shares to Laird in a manner to entitle him to a transfer of them in its books, but for a debt Patton owed. Held further, the bank was not obliged to allow the transfer till paid said debt, though it had other security. In this the practice in equity is the same as in law, both respect the contract.

3 Cranch,  
 220, Milligan,  
 admr. v. Mil-  
 ledge & ux.

§ 21. *Pleadings and parties.* Error to the Circuit Court of Georgia, in chancery. The bill was to recover from the debts, legatees and devisees of G. G. deceased, a debt due to the plt's. intestate, as surviving partner of Clark & Milligan, merchants of London, who supplied G. G. with goods in 1770, and to his three sons at his request in 1773, &c. Points, 1. If the executor of the debtor has no assets, his devisees and legatees may be sued in equity: 2. A plea is bad, which denies only a part of the material facts in such bill stated: 3. A mere denial of facts is not proper for a plea to a bill in equity: 4. But *secus* as to an answer: 5. If the bill suggest the proper parties are out of the jurisdiction of the court, the want of them is not a proper ground: nor 6. A reason for dismissing the bill. In this case one plea was by the wife alone, a second by the husband alone, and both jointly pleaded said plea.

4 Cranch,  
 177, Viers &  
 ux. v. Mont-  
 gomery.

§ 22. If the owner of a tract of land give to A by deed, and afterwards by will devise the same land to B, a court of equity will not interfere between A and B, if there be no fraud in the case, but will leave them to settle their claims in a court of law. In such a case there is no equity. The only question is, which has the best title, and this is a mere legal question.

4 Cranch, 72,  
 Pendleton &  
 al. v. Wam-  
 bersie & al.

§ 23. This was error to the Circuit Court for the District of Georgia, in a suit in equity. The bill was grounded on a joint-partnership of a number of persons for the purchase and

sale of a large tract of land in Georgia, not exceeding 200,000 acres. Held, that the assignee of an assignee of a copartner could support a bill in equity against the other copartners, and the agent of the concerned, to enforce a discovery of the quantity of land purchased and sold, and for an account and distribution of the proceeds.

CH. 226.  
Art. 16.

§ 24. Case in chancery from the Circuit Court of Kentucky. Held, wherever a deft. has failed to perform his contract, and is unable on his part to perform it, equity will annul the contract. Lands are assigned to the obligor in a bond, as a consideration of it, and the obligee in it gets titles in his own name to a part of the lands, and suffers the titles to the residue of the lands to be lost by the non-payment of taxes, a court of equity will not aid him to carry into effect a judgment at law on the bond.

4 Cranch,  
187, Skillern's exrs. v. May's exrs.

§ 25. In these involved cases it was decided: 1. That a court of equity will not enforce a specific performance of a contract to convey lands, if the vendor cannot make a good title to the whole of the land contracted to be conveyed: 2. The court will not enforce the specific performance of part, nor a conveyance where the person to be ordered to convey cannot give a title: but 3. Equity will dispense with the time, where not of the essence of the contract to convey; therefore, if the vendor can make a good title at the time of the decree, he may be compelled in equity to make a specific conveyance and specifically to perform, though he had not a good title when the lands should have been conveyed by the terms of the contract: 4. After a long possession in severalty equity may presume a deed of partition. This case as it respects the whole &c. excludes very properly scores of English cases *pro tanto*, which have been noticed. 4 Har. & M'Hen. 431.

5 Cranch,  
262, Hepburn & al. v. Auld.—One case error, other appeal.

As to *pro tanto* cases, see further,  
1 Ves. & Beam. 352.—  
3 Do. 187.—  
Attor. Gen. v. Day.—1  
Ves. 218.—  
10 Ves. jr. 616.—See a. 2, a. 21.

ART. 16. *How far shall a party be obliged to disclose in equity.*

§ 1. In all parts of the proceedings in equity it is often a question, how far a party shall be ordered by the court to disclose or discover facts or papers to the advantage of his opponent. We have seen a deft. shall be held to disclose, not his own title, but what he knows or has in support of his opponent's, on the principle a party in chancery is entitled to evidence that supports his own right and title, as being in fact his evidence, (art. 2, s. 21,) but happens to be in the possession or power of his adversary. Another rule we have seen is, that a party is not held to disclose any matter that tends to criminate himself, to subject him to a penalty or to a forfeiture. This rule is fundamental in the English and our systems, and was known in the civil law. Yet a third rule, a

See a. 5, a. 9,  
17, 19, &c.  
&c.

14 Ves. 69.—  
Cooper, 202  
to 207, 296.—  
9 Ves. jr. 619.

CH. 226.  
Art. 16.

6 Ves. jr. 52.  
—9 Ves. jr.  
516.—1 Ves.  
206.

Deft. must  
answer in  
mere cases of  
contract, but  
not held to  
disclose neu-  
ry, mainten-  
ance, &c.—  
Coop. 296.—  
Cooper's Pl.  
191.—Cites 1  
Atk. 288, &c.  
—6 Ves. 821.

party may be obliged to disclose facts to his disadvantage in a suit, on the ground, chancery will never enable a deft. to commit a fraud by resisting a disclosure or a discovery. As if an estate descend, and the owner is informed by the heir that if allowed to descend to him, he will provide for his mother, wife, or other person, the court will compel the heir to discover whether he did make such promise, though he insists on the statute of frauds. So the court obliges a devisee to discover, in favour of an heir, whether the devise to the devisee is not upon trust for a secret charity. The principle in these and other cases seems to be this :—when a deft. has a fact in his own knowledge, not provable but by his disclosure, and to keep it concealed would be in him a fraud in violation of the plt's. rights, legal or equitable, the deft. shall be obliged to disclose the fact, so far as to do justice and pay or allow what is honestly due ; but not to incur any penalty or forfeiture, or to discover the mere evidence of his own title ;—also, all such disclosure is confined to matters merely civil, as chancery has no concern in criminal matters. Nor does chancery compel a disclosure in aid of any court which can itself compel a discovery, nor in aid of an arbitration. 6 Vesey jun. 821 ; 2 Vesey, 451. And if the plt. in his bill prays a discovery, and also relief, though only the delivery of deeds, chancery will not aid him when proceeding at law without its authority, by ordering the deft. to produce deeds at the trial. 6 Vesey jr. 288 ; cited Cooper's Pl. 60.

§ 2. The plt. to entitle himself to the disclosure he wants, must in his bill state his case accurately and concisely,—the subject matter, the parties, their interests, and his right to the disclosure or discovery he prays for. Several cases and rules, Cooper's Pl. 187 to 209. Mr. Cooper has arranged the grounds of demurrer to a bill of discovery under thirteen heads ; the substance of which have been noticed already, especially in article 5, and as far as proper in this work ; except perhaps the 9th ground, which is, the deft. is not bound to show his title ; the 10th, the discovery if obtained is not material ; and 13th for not annexing an affidavit. There can be no disclosure of professional confidence reposed in counsel ; Cooper, 196 ; nor of the deft's. title,—the plt. is not to pry into this. 2 Vesey, 445 ; 4 Vesey, 68 ; Cooper, 196, Adderley v. Sparrow. Heir in tail is entitled only to the deed creating his estate. Id.

8 Vesey, 406.  
—2 Vesey.  
243.—2 Com.  
D. Chan. 3 B  
2.

§ 3. A wife cannot be made to discover any thing that would subject her husband to a prosecution ; nor can a deft. be made to discover any fact that would subject him to punishment for incest in the ecclesiastical court. And the deft. was allowed in such a case to plead matter to show that the

marriage charged if real was incestuous, and would subject him to pains and penalties. Same principle as to bigamy. CH. 226.  
Art. 16.

§ 4. Nor is the deft. held to disclose he has violated a statute. As where the deft. got insurance on a ship that was lost, and the plt., the insurer, brought his bill, and in it alleged that only wool was on board instead of proper goods, and in the interrogatory part of his bill called on the deft. to state the kind of goods on board. Deft. pleaded in bar to the discovery, the acts of parliament making it penal to export wool; and his plea was held good. 1 Atk. 53.—  
2 Com. D.  
Chan. 3 B 2.  
—Hard. 138,  
144.

§ 5. But the deft. is compellable to discover a fact that will not subject him to penalties, though connected with one that would. Hence a deft. was compelled to answer a question, if he had a legitimate son, not a penal matter, though the discovery of his marriage with the son's mother might subject the deft. to a penalty. Therefore, he was not compelled to discover the marriage. 2 Vesey, 493.

§ 6. So the deft. was compelled to discover a promise not to marry, though he had betted ten to one with the plt. that she would not marry. So a promise to marry was stated in the bill brought for its discovery, and the disclosure of it was enforced. The bill was in aid of an action of *assumpsit* (not tort) on a contract between the parties; and the court said, in this case an answer must be given as in other cases of contracts. In all these cases the distinction, as above, is between mere matters of contracts, which must be discovered, and torts, which if confessed, discovered, or proved subject to penalties or forfeitures of estate. 2 Ch. Ca.  
240, 241.

§ 7. On this ground if the penalties or forfeitures be waived, done away, or there is security against them, so that on the discovery called for they will not be incurred, they then afford no objection to the discovery. As in the case of waste committed by tenant for life, where the plt. is entitled to the inheritance. If he waive the forfeiture for waste by the tenant, he shall be held to discover: and the waiver must be by all entitled to the penalties or forfeitures waived. Cooper's Pl.  
298, 299.

§ 8. Though the deft. may plead to the discovery of an act which would cause a forfeiture; but not, to discover what estate he has, as whether tenant for life or not, though on that the forfeiture depends,—but not immediately. 2 Atk. 453.—  
Com. D.  
Chan. 3 B 2.  
—1 Vern.  
109, 129, 306.

§ 9. Deft. is not compellable to disclose a fact that will vacate his seat in parliament. 3 Atk. 276. And this he must insist on by answer and not demur. 2 Com. D.  
Chan. 3 B 2.

§ 10. No bill of discovery lies of things not examinable or relievable in equity; as the ill usage of a husband to his wife. 1 Vern. 204. None for the discovery of a trust estate, if the trust be denied, till the trust is proved; for it is 2 Com. D.  
Chan. 3 B. 2.

CH. 226. sufficient the party afterwards be examined on interrogatories.  
Art. 17. Ch. R. 4.

Cooper's Pl.  
226, 200.

Hughes v.  
Blake, 6  
Wheaton,  
463.—See 2  
Atk. 165,  
693.—Gilb.  
Ch. 168.—  
1 Ch. Ca. 56,  
Ware v. Han-  
wood.—14  
Ves. jr. 81.

§ 11. A deft. may plead in bar of a discovery, that his knowledge of the fact was obtained as an arbitrator, as counsel, &c.

§ 12. *Practice in chancery.* Answer equal to one witness &c. Replication admits the equity of a plea &c. This was a bill filed in the Circuit Court of Massachusetts to recover of Blake monies arising from the sale of Yazoo lands. And held, the deft's denial in his answer in support of his plea is conclusive, unless contradicted by more than one witness, or one witness accompanied with corroborating circumstances : 2. A replication to a plea admits its sufficiency in point of equity, and the deft. has only to prove the facts in his plea. The deft. answered without waiving his plea, which was of a former judgment in a State court. Cited Cooper's Pl. 141, 226, 231, 251, 255, 266 ; Baleman v. Willoe, 1 Sch. & Lef. 201, 205, 725 ; Milsford's Pl. 90, 193, 244 ; Beames' Eq. Pl. 317 ; Wyatt's Prac. Reg. 376 ; Harris v. Ingleden, 3 P. W. 95. When a plea is bad the plt. may set it down for argument, and it may be overruled. 3 Atk. 606 ; 1 Burr. 396 ; 1 Bro. Ch. Ca. 305 ; 9 Ves. jun. 75 ; 1 Johns. Ca. 436 ; 1 Vern. 310, &c. &c.

2 P. W. 156.  
—1 Do. 164.

Spring & al.  
v. S. Caroli-  
na Ins. Co., 6  
Wheat. 519,  
520.

§ 13. *Practice.* In an equity cause the property in dispute may be sold by order of court, and the proceeds invested in stocks, though there be an appeal pending to the Supreme Court of the United States. New rule as to appeals, 32 ; preface p. 6.

1 Hen. &  
Mun. 100  
to 133, Long  
v. Colston.  
See Eaton v.  
Lyon, 8 Ves.  
jr. 692.—1  
Fonb. 29,  
130.

§ 14. *Contracts to convey lands.* Held, that after the contractee has sued at common law to recover damages for a breach of contract, he has no right to sue in equity to compel a specific performance, but under very special circumstances and on grounds of equity. And if one party resort to his legal remedy, the other cannot go into equity after a trial at law. Harrington v. Wheeler, 4 Ves. jun. 684 ; Loyd v. Collet, 4 Bro. C. C. ; 2 Bro. C. C. 343, in Errington v. Annesley.

Art. 17. *What is a fraudulent decree.*

§ 1. Not only decrees obtained directly by imposition are fraudulent, but also those obtained without making the proper parties to the suit ; that is, those whose rights are affected by it ; and are void as to them, and even as to a purchaser under such a decree, having notice of the defect. Cooper's Pl. 96. As a decree is void made against a trustee, the *cestui que trust* not being before the court and the trust not discovered. Id. Thus by a fraudulent concealment the plt. gets a decree that materially affects the rights of the *cestui que trust*, without giving him the opportunity he is entitled to, every man's right

to be heard in every trial in law and equity in which he has an interest; also by misleading the court, in as much as it is not informed of the interest of the *cestui que trust*.

CH. 226.  
Art. 18.

§ 2. So if the plt. obtains a decree against a deft. who has conveyed away or incumbered his interest, not discovering this fact, and not making the real owner a party, the decree is in a legal sense fraudulent and reversible on a bill impeaching the decree for fraud. 1 Ch. Ca. 151; 3 Ch. R. 95.

§ 3. So if the plt. get a decree against the heir of A when he has devised the estate to B, and he is not a party, and the fact of a devise is not disclosed, this decree also is fraudulent. Cooper's Pl. 97. And if an improper decree be obtained against a minor, he may by original bill reverse it while a minor. 1 P. W. 737.

§ 4. A bill to set aside a decree for fraud, in such cases must state it, and the proceedings that led to it, with the circumstances of fraud and the real grounds of impeaching it; and the prayer of the bill must vary according to the nature of the case.

ART. 18. *Par delictum,—in pari delicto.*

§ 1. How equity may punish fraud &c. in the parties in proportion as they are more or less culpable. As where Winston was largely indebted to Austin, and other creditors, and Austin advised him to make over his property, in secret trust, to defraud them. In this scheme Winston readily and heartily concurred; and Austin, under the pretence of a fair auction sale, got possession of seventeen of Winston's slaves, in payment of a debt of only £200, though a just one. Both died, and Winston's executrix filed a bill against Austin's administrators for an account of the slaves. It was said by counsel, that as both Austin and Winston contrived to defraud &c., they were *in pari delicto* &c. But the court held it could afford some relief to the creditor Austin, as the less culpable, and consider Winston as the most in fault, as it was his legal and moral duty to pay his creditors as far as he could, and he readily violated his legal and moral obligations. Hence the doctrine held, was, that the court could apportion the relief granted to the degree of criminality in both parties; so as on the one hand, not to encourage fraud, and on the other, to prevent extortion and oppression. This is a useful case, as a debtor often combines with one or more of his creditors, to defraud the others. Jackson v. Lomas, 4 D. & E. 166, 170; Ch. 1, a. 35, s. 2; Robinson v. Gee, 1 Vesey, 254; 2 Vesey, 160; North v. Ansell, 2 P. W. 619.

Austin's adm.  
v. Winston's  
exr., 1 Hen.  
& M. 33.—  
See Ch. 9, a.  
8, s. 6.—Ch.  
9, a. 10, s. 3.  
—Ch. 9, a. 7,  
s. 3, as to  
persons *in  
pari delicto*  
or not; and  
Ch. 49, a. 12,  
s. 13 &c.—  
See Law v.  
Law, 3 P. W.  
392.—Ch. 1,  
a. 29, s. 2.—  
Ch. 99, a. 3.  
—Jackson v.  
Duchare,  
3 D. & E.  
551.—2  
Fonb. 6. a.

§ 2. So in this case it was held, on a bill in equity, that as between the parties there was no *par delictum*. The vendor had sold public certificates, to which he had no right, but

Wise v. Craig,  
1 Hen. & M.  
577, 584.



CH. 226. which he got by fraud, and received £600. for them. The vendee filed his bill to have his monies restored to him. The deft., the vendor, relied on the maxim, "*in pari delicto potior est conditio defendentis.*" The court decreed the monies to be restored, on the ground the plt. was not *in pari delicto*. In this case, and in *Austin v. Winston* above, the court considered one party more culpable than the other, and decided accordingly. This course has been often adopted in cases of usurious loans, and of extortions in bankrupt cases, as seen in the chapters cited above.

Nelson v.  
Mathews &  
al., 2 Hen. &  
M. 164, 181.

§ 3. *Where lands warranted fall short.* Appeal from the superior court of chancery. Held, 1. If A convey land with general warrantry, as containing, by estimation, 572 acres, more or less, when his own title papers shew less, he is bound to make good the deficiency: 2. Words, *more or less*, when the deficiency is only eight acres in 552 acres, it is no more than the purchaser who buys for more or less, may reasonably expect: 3. When land is sold with warranty, and it falls short, the buyer is to be compensated for the deficiency, at its value at the time of the contract.

If several tracts be sold as all adjoining, for a gross sum, and no specification is made at the time of the contract, of the quantity or separate value of each parcel, and each fall short, the purchaser must be compensated for such deficiency, by taking the average value of the whole. As to the value at the time of the contract, see Ch. 28, sundry cases; and *Pendleton v. Vandevier*, 1 Wash. 381.

Crawford v.  
M'Donald, 2  
Hen. & M.  
189, 193.

§ 4. Where the assignor of lands is not liable in law or equity, though the title be forged. Case in chancery. One Tribble by deed acknowledged he had sold to M'Donald 800 acres of land, lying on the head of Buffaloe Creek in Logan county, in Kentucky, and had received \$200, the only description. M'Donald, by indorsement, assigned the deed with all benefits, to Crawford, being for value received from him, without recourse. Tribble, when he agreed with M'Donald, delivered him a patent, purporting to be a grant to one B. for 800 acres, on the head of Buffaloe Lick Creek, but shewed nothing from him to Tribble. This patent M'Donald delivered to C. at the time of the assignment, and took his two notes, \$200 each. On these, judgments at law were obtained, and enjoined on the ground the patents were forged. Held, M'Donald, the assignor, was not liable, on his denying, in his answer, that he had any knowledge of the forgery; as also denying all fraud, and there being no proof to the contrary. Crawford, agreeing to have *no recourse*, took all risk.

Pollard v.  
Patterson's  
admr., 3 Hen.  
& M. 67, 88.—M'Call v. Peachy, 1 Call, 55.—Pryor v. Adams, 1 Call, 387.

§ 5. *Chancery jurisdiction in Virginia.* The true construction of the statute, 1 Rev. Code, p. 66, c. 64, s. 29, as to

chancery powers, is, that if it appear on the face of the bill, the matter in it is not proper for a court of equity, the bill must be dismissed, even "after answer filed, and no plea in abatement to the jurisdiction of the court." Even consent of parties cannot give jurisdiction to a court, nor can any pleadings, when want of jurisdiction appears on the record, especially by the plr's. own shewing; and after demurrer overruled, jurisdiction may be questioned. See Ch. 223, a. 11, s. 35. This case of Pollard &c. respected a settlement relating to 75,000 acres of land, and the case appeared on the face of the bill to be merely a legal question. The important section above, on which the question of jurisdiction arose, was, "after answer filed, and no plea in abatement to the jurisdiction of the court, no exception for want of jurisdiction shall ever afterwards be made, nor shall the High Court of Chancery, or any other court, ever thereafter delay or refuse justice, or reverse the proceedings for want of jurisdiction, except in case of controversy respecting lands lying without the jurisdiction of such court; and also of infants and *femes covert*." The court held this clause respected only mere equity causes, and not cases clearly law cases on the face of the bill, as then the defence is by demurrer, and not by plea.

CH. 227.



§ 6. Where a purchaser in equity cannot have title to all, and such relief against a judgment at law, because the vendor has not title to all, the purchaser must prove an actual eviction, or a better title in some third person. It is not enough to allege such want of title, especially when there appears no fraud or concealment in the vendor or knowledge of defect in his title.

Mitford, 99,  
102, 176,  
178, 179.  
Yancey v.  
Lewis, 4  
Hen. & M.  
390, 395.

## CHAPTER CCXXVII.

### CAPTURES IN WAR.

§ 1. Property by capture is a species of property acquired not by descent, devise, or purchase, but by a hostile seizure in war, with or without condemnation, according to the municipal law of the land. In regard to it, the material and difficult question usually is, whose is the property thus

See Admiralty, Ch. 186.—See Insurance, much of the law as to captures. — See Seizure, on Captures.

Ch. 224, many cases of seizure of property.—Wheaton

Ch. 227. said to be acquired,—property acquired in a limited and peculiar way,—property special and qualified ;—we ascertain the kind and right of property, then the remedy &c.

Grotius, lib. 2, ch. 4, s. 8. Vattel, lib. 3, ch. 4.—Chitty's Law of Nations, 1, 2, &c.—1 Rob. R. 196, 207, 219.—8 D. & E. 648.—Chitt. Law of Nations, 302, 313.—1 & 2 Wheat. Append.

§ 2. This enemy's property is wholly acquired by the laws of war. The only material question is, when is it acquired so as to be the property of the captor, and to entitle him to a remedy or suit to recover it, or for an injury to it. In this case, as in every other, his bare possession is sufficient *quoad*, a mere wrongdoer, to enable him to support case in trover for his converting it, or an action on the case for a nuisance or injury to it, and hence the captor sustains consequential damages. And the question is material only as to the former owner ;—for as to my enemy, I have always a right to seize his property if I can, and he has always a right to seize and take it from me if he can do it ; and the question of right of property, can never properly exist but between the former owner and the neutral vendee, or former owners and recaptors.

This question has often risen in our courts, and has been decided on the proper laws,—the laws of nations and of war ; and not on municipal law.

The case of the ship Mary Ford, C. Court, Boston, 1796, and Supreme Court of the U. States.

§ 3. In this case of the ship *Mary Ford*, the material points as to this question were largely considered. The case was thus :—September 28, 1794, a small French fleet of armed vessels, N. lat. 44, W. long. 41, fell in with the British ship *Mary Ford*, (then war existing between the French and English,) about 300 tons, laden with sugar, bound from Jamaica to London ; the value of the ship and cargo was about \$44,000. One of the fleet, all lying in sight, attacked and took her ; took out her hands, and put on board her a French prize master and hands, and brought her into the fleet, with which she sailed about thirty hours. The French then finding themselves short handed, took their hands out of the *Mary Ford*, set fire to her, and abandoned her, but the fire went out.

August 4, 1794, the ship *George*, owned by William and Joseph Foster, sailed from Boston for Virginia and Rotterdam, one Treat, master, ship and cargo worth \$25,000. October 2, 1794, found the *Mary Ford* abandoned, and no living creature on board, except two pigs ; her sails flying and torn, and about three feet of water in her hold ; otherwise she was sound ;—put the mate and three hands on board her, to bring her into Boston, New York, or Philadelphia ; and the *George* pursued her voyage to Rotterdam. November 1, 1794, the *Mary Ford* arrived in Boston ; and on a libel filed by the owners &c. of the *George* for salvage, the British consul, by

See 6 Wheat. 162 to 176, held, a foreign consul has a right to claim, or to institute a proceeding in rem. where the rights of property of his fellow-citizens are in question, and without a special power from them ; but without it, he cannot receive their property : also held, salvors by spoliation &c. may forfeit their rights to salvage.

Dana and Gore, his counsel, claimed the *Mary Ford* for the British owners; and the French consul, by Sullivan and Morton, his counsel, claimed her for the French Republic. The owners &c. of the *George* claimed salvage; Otis was counsel.

CH. 227.

It was agreed that the United States were neutral. \$15,000 salvage was decreed by the District Court, and the court adjudged the property to the former British owners. There was no appeal as to the salvage; but as to the right of property there was an appeal to the Circuit Court, held October, 1795. This court adjudged the property to the French captors, and February term, 1796, the Supreme Court of the United States affirmed the decree of the Circuit Court.

The real question on the appeal was, which, the French captors, or the British owners, were entitled to the property, after the salvage was paid. Out of this general question, arose two: 1st, Did the French, by the seizure and thirty hours possession on the high seas, then obliged to abandon her, acquire the property?

2d. Had the French such a *last firm possession*, or any such possession of the property, as a neutral nation was bound to notice; and on the ground of that possession to restore the property to them? Both these questions of right or firm possession, though not of mere last possession, were in fact involved in the question, *prize or no prize*, or did the French make a legal capture. But when the question, *prize or no prize*, is between two belligerent nations, it was conceded that a neutral nation could not directly have jurisdiction of it: 1st. Because, as Lee, (239,) says, "The proper and regular court for the trial of prize causes, is the court of the country or state, to which the captor belongs; and the proceedings must be in a court of admiralty, proceeding and judging according to the laws of nations and treaties." Confirmed, 4 Wheaton's R. 52 to 73. Hence captures made of the vessels of Spain by her colonies in their civil war, could not be tried in the United States, being neutral, unless their rights be violated. 4 Wheat. R. 52 to 73, case of the *Divina Pastora*. And by our treaty of 1795 with Spain, our citizens cannot take commissions from any state with which the king of Spain is at war, to capture Spanish property. Held, such states includes the Spanish revolted colonies in America; and if our citizens under commissions from them, capture Spanish property, the captures are piratical. 6 Wheaton, 152, 176.

9 Cranch,  
359, The  
Alerta.

2d. The states at war may have treaties and laws relating to captures, not known to the neutral. In England condemnation is necessary to complete the capture, or to change the

CH. 227. property. Burr. 683, 1198. But the law is not so in this and many other countries.

3d. A neutral nation is bound to act impartially towards both powers at war. It cannot interfere in their disputes, and it cannot pass judgment on their capture : though the French urged that a neutral court has jurisdiction of the question of legal capture, when, as in this case, it is brought before the court indirectly ; for British and French each claimed the property, paying salvage, and made the question which owned the property, and cited 4 Coke's Inst. 154, where the Dutch and Spaniards, being at war, a Dutchman, in open battle, on the high seas, took the property of the Spaniard, and carried it into England, then a neutral nation, the Spaniard claimed it, and the Court of King's Bench decided that the Spaniard had no right to recover it in England. It was observed by the counsel for the French captors, that two points were here decided : 1. That a neutral court decided a question about property between owner and captor : 2. That the property was adjudged to the Dutchman, the captor, though he never carried it into a place of safety in his own country, but only into a neutral port ; and though he never caused it to be condemned. But the counsel for the British owners answered, that here the neutral court found the Dutchman in possession of the property, and the court could not take this possession from him, and give it to the Spaniard, without trying the right or the legality of the capture, which the court being unwilling to do, decided they could not give judgment that the Spaniard recover in England ; hence the Dutchman kept possession of course. This had been the present case, if the French captors had brought the prize into our port.

The counsel for the French argued, that they acquired the property by the seizure in full right of the laws of nations ; that the battle was over ; that on bringing the *Mary Ford* into the fleet, she was their property ; that as soon as the captor takes possession, his capture is complete, and the right of property in the thing captured is vested in him ; that they abandoned the *Mary Ford* conditionally ; if saved, to reclaim her ; if not saved, not to claim ; and that the finders brought her in as agent to the French captors ; and cited Park, 78, who cited Grotius, who said, by a new law of nations, established among the Europeans, such prizes are condemned, when they have been twenty-four hours in the enemy's possession ; and Burr. Vol. 2, p. 224, 224, says, it is not necessary to complete the capture to bring the prize into a place of safety, or to have it condemned ; also cited Lee on Captures, 82, 83, who adds, "prizes from the enemy certainly become the property of the captors as soon as taken." And all nations

agree, that to change the property by capture, a firm possession is necessary ; yet they do not agree what constitutes this firm possession. The rule, *infra præsidia*, or of twenty-four hours, in proper cases, seems generally to be adopted by the most eminent jurists on the continent of Europe. 2 Wheaton's R. Appen. 41 ; cites 1 Dodson, 105, 185, 253 ; 1 Rob. 49, 50. And it appears to have been anciently the doctrine of the British law ; but now its rule is condemnation as to a vendee or recaptor. *Id.* ; 1 Rob. 134 ; 1 Edw. 97 ; 3 Rob. 333 ; 4 Cranch, 293 ; 6 Cranch, 281 ; 6 Rob. 138, 194.

The counsel for the British owners argued, that by this taking, there was no change of property ; and that by it the French acquired only a temporary possession ; and, in the peculiar situation they were in, only a precarious one ; for by the laws of nations, there is no change of property, and the captors acquire no right of property, until the thing seized be carried, by the captors, into a place of safety, as into a fort, port, or strong place in their own country, or that of an ally in the war ; and cited Park, 78, 81, " Moveable property of the enemy is acquired the moment the captor has it in his power ; but then it must be in his power, by being carried into a place of safety. This place of safety is such as leaves no hope to the enemy of pursuing and recovering his property." The counsel for the British owners further urged, that the modern practice does not conform to this doctrine of twenty-four hours ; that this is clear ; that Bynkershoek, a later writer, and on much consideration, rejects it ; and that he and Roccus add several authorities to support the doctrine of *infra præsidia* ; and that neither the Dutch, British, or French, practise on the principle of twenty-four hours' possession.

It is understood that the courts decreed this property to the French, principally on the ground they had the last possession ; and so a neutral should restore the property to them, the party last in actual possession of the two parties at war.

Cases of dereliction, 4 Rob. R. 216, Am. ed. 178.

The authorities read and examined were Lee on Captures, 83 to 90, and 210, 78, 83 ; Vattel, second part, 77 to 79 ; 2 Wooddeson, 454 ; 2 Coke's Inst. 167 ; 2 Burr. 1198 ; Emerigon, 464, 502, 521 ; 2 Stra. 1250, Dean v. Dicker ; 2 Burr. 683 ; Grotius, lib. 3, c. 6 ; Park, 80, 81 ; 2 Burr. 225. See 1 Wheat. R. 259 ; see 3 Dallas, 233, a case thought by some to be like this of the *Mary Ford*, decided differently. The truth seems to be, that as between enemies, the capture is complete immediately on taking ; and the place of safety has been established only as to *postliminy*, as between the former owners and recaptors, being fellow-citizens, or the former owner and neutral vendee. As between enemies there is no right of property, the right of the captor over the thing

General principle.

**CH. 227.** taken, during the war, "is of force only in respect of a third disinterested party," as to which the rule has been settled solely; that is, the neutral or recaptor; and this is to decide when the neutral, who buys the property of the captor, may call it his, and hold it against the former owner; or when as against him, the friendly recaptor shall hold it. And all agree that when the captor has a firm possession, he has the property;—a possession in such a place of safety, as shall reasonably induce the former owner to give over his hope of recovery. But to suppose the captor has right of property immediately on seizing the thing, involves this absurdity, to wit: My enemy has full right to my property as soon as he can take it on the high seas, and before he brings it into port, and sells this full right to a neutral, and yet he has no right to hold it from me. Another absurdity, that my right, as former owner, is fully divested by the capture, made by my enemy, and yet I can recover the property by law, against his vendee; for the rule of twenty-four hours goes on the ground that a mere seizure by an enemy, of an enemy's property, does not immediately give title to it, or change the property. These absurdities being seen, and to avoid them, the rule has been settled, that the captor shall be deemed to have full right, by capture, when he has the prize *infra prasidia*, or in a situation to give a title to the neutral vendee, and not before; and firm possession is the same as *infra prasidia*. No doubt the captor may immediately hold the thing against a fellow-soldier, because, as to each other, they are in a state of society, and even possession alone is enough for this. A small fleet on the high seas is no place of safety; and the alien's only right to ask the protection of the neutral government, is for his possession he has within its jurisdiction, where he owes a temporary allegiance, and where he is forbid to defend by force; and for his possession so long only as he has it.

MRS. ESSEX,  
A. D. 1778,  
Derby v. —,  
neutral vendee,  
S. J. Court.

§ 4. This was an action brought by Elias Hasket Derby, against a neutral vendee, a Portuguese. The case was, Derby sent his vessel to sea, which was captured by a British privateer, and carried into Portugal, a neutral place, and sold her to the deft., she not having been condemned, and afterwards he came in her to Salem, where Derby lived; and he brought this action to recover her, on the ground his former property was not divested, by the capture of his enemy, for want of condemnation.

English ship  
captured by  
Algerines,  
carried into,  
and sold in  
Algiers—sale valid,  
being according to  
the law of the place.  
4 Rob. R. 3, 6, 35  
to 52. A neutral  
port is not *infra prasidia*.  
A prize there is not  
subject to an enemy's  
court in principle.

The court, on the merits decided, that though there was no condemnation, the Portuguese vendee might give in evidence a capture and sale to prove his property, and that no

condemnation was necessary, being only British law; also CH. 227.  
 that bringing *infra præsidia* of the captors, in order to change the property, was not necessary. In this case, Portugal, being neutral in this war between Great Britain and her colonies, was, in fact, a place of safety, within the meaning of the laws of nations.

This was an action on the case in trover, and therefore it may here be observed, the question was a question of property in the case of a capture, in a court of common law; but this trial was before the rule making the question of *prize* or *no prize*, exclusively of admiralty jurisdiction, was much considered in our courts. As to this change of property by capture, Sir William Scott observes, that some rule is desirable, and it may be the rule of immediate possession, or the rule of *pernoctation*, and twenty-four hours' possession, or bringing *infra præsidia*, or condemnation. But the fact is, says he, "there is no such rule of practice." "Nations concur in principle, indeed, so far as to require firm and secure possession; but their rules of evidence respecting the possession are so discordant, and lead to such opposite conclusions, that the mere unity of principle forms no uniform rule to regulate the general practice." 1 Rob. R. 50, 117. And 1 Johns. R. 471, 485, Kent C. J. seems to be of opinion that condemnation in a proper court, is now the rule adopted by all nations as essential to divest the original owner of his property. (Journals of the Revolutionary Congress, Vol. 7, p. 68.) And a law court may inquire if a court abroad be competent legally to condemn prizes.

§ 5. This action was case for money had and received. The case was—after the peace of 1783, the plt's. vessel, the brig Thomas, was captured near Newburyport bar, by a British privateer, owned by the defts. and carried to Penobscot, then in the possession of the British king; libelled in the Vice Admiralty Court at Halifax, and ordered to be restored. The defts. appealed, but gave no bonds to prosecute their appeal according to act of Parliament, of which our court took notice. Our court decided there was no legal appeal. The plt's. agent returned to Penobscot, where the vessel and cargo were, and there they were sold by an auctioneer, by the consent of the plt's agent, and of the defts., as the property was depreciating, and it was agreed that the proceeds should wait the right of property and capture. The plt now brings this action to establish his right to the proceeds; and the court decided that the auctioneer is a good witness, and that his testimony ought to be had; and that his declarations in the case cannot be proved. There being no legal appeal, the Halifax decree was conclusive.

Hooper v.  
Pagan & al.  
Mass. Exec.,  
June Term,  
1789, S. J.  
Court.



## CH. 227.

It was objected, that the plt's. right to recover depended on the right of capture, or the question of *prize or no prize*; that this question with all its consequences is exclusively of admiralty jurisdiction, for whether prize or not, is to be decided by the law of nations, and not by the common or municipal law of any country. But the plt. in this case went on property; as if A takes B's property wrongfully, and sells it, B may waive the tort and sue for the money; that the plt's. property was in him on and after the decree of restoration, which settled the prize question, and that the defts. illegally sold the plt's. property. The opinion of the court was with the plt.; and the jury found a verdict for him of about \$10,000 damages, including interest. See many cases as to admiralty jurisdiction, 2 Wheaton's R. App. 1, &c.; and Ch. 186.

3 D. & E.  
323, 348,  
Smart v.  
Wolf.—1  
Phil. Evid.  
266.

4 D. & E. 382,  
Ld. Campden  
& al. v. Home.  
—1 H. Bl.  
476.

5 Bac. 119,  
261.—See  
several cases  
in this article  
in Ch. 40; in  
Ch. 224,  
Seizures, &c.  
&c.

§ 6. On this point of admiralty jurisdiction, Buller J. in this case stated, that the modern doctrine is, that the question of prize and the consequences are solely and exclusively of admiralty jurisdiction;—also of freight due to a neutral from an enemy whose goods are captured. 2 Wheaton's R. App. 1, 2.

§ 7. In this case against *Horne*, the same point of jurisdiction is held to be law; and also, that after a decree of the prize to the captured they may file a libel for restitution against the captors.

§ 8. The point seems now to be clearly settled, that where it is necessary to decide the question of *prize or no prize*, it is exclusively of admiralty jurisdiction; but where the cause can be decided without settling this question, as where the plt. rests his action on possession, claiming the property as his own, the action may proceed in a common law court; and of this opinion was Judge Elsworth C. J. in a subsequent case, and so was the opinion of the Supreme Judicial Court of this State. This is the only true distinction. For where the question, *prize or no prize*, must be decided, it must be done in the admiralty, because it must be decided by the law of nations and of war, of which the admiralty is judge, and not the Common law courts. And when the dispute is with the former owner or neutral vendee, it is usually necessary to decide the question of *prize or no prize*, or if any right of property was acquired by the capture; and this decision can be properly made only in the maritime courts, proceeding by the law of nations and of war. But when the plt. has had possession, and contends with a mere stranger, and grounds his action, as he may, on his possession, claiming the property as his own, the action then is properly at common law, rests on possession, and is to be settled by the rules of the common law.

2 H. Bl. 515.  
—And 2 Dal-  
las, 176.

§ 9. So when the prize question is decided the captor's rights are a ground of suit at law. And see Ch. 106, a. 9;

Ch. 224, several cases. Thus numerous actions at common law (as well as proceedings in the admiralty) grow out of captures and seizures for forfeitures on two grounds: 1. Where the plt. goes on his possession of the thing captured or seized: 2. After the instant or prize court has decided and finally settled the question, *prize or no prize*, and the question if forfeited or not; (these numerous actions are found, not only in this chapter, but in cases of insurance, of seizure, &c.) and sometimes out of the captor's right of property in a prize, which he can assign before condemnation. 1 Wils. 214.

In considering the places of capture it is material to observe that the admiralty jurisdiction extends to captures in rivers and ports of the captor's country, and to money received as a ransom. 4 Dallas, App. 1; Dougl. 606, 613; 4 Rob. 388; Ch. 40, a. 3, s. 1; 1 Dougl. 649; 1 & 2 Galli. If two nations are in amity, no commission or place of equipment whatever can authorize the subject of one to capture the property of those of the other; and if they do capture it and bring it into the country of the captors, their capture is unlawful, and their country will restore the property to its former owners. This well settled principle shews that no subject or citizens whatever can be commissioned or authorized to make legal captures by their own government.

§ 10. In this case the jury found a special verdict, as follows, viz. that brig Union (the prize contested) was captured on the high seas by the American privateer Exchange, John Collins commander, and kept in his possession twenty days, and then was retaken by a British frigate and kept by her in her possession sixteen hours, and then was retaken by the French frigate Astrea, and by her sent into port, and condemned to the use of the Astrea alone in a maritime court, and in this court (Supreme Judicial Court) the owners and crew of the privateer Exchange claimed the said brig Union, paying salvage to the Astrea. (As to recaptures see Marten's Law of Nations, 290; Wheaton on Captures, 234 to 251.)

After time to advise, the court unanimously gave judgment that the Astrea was entitled to the whole prize. The authorities cited were, Beawes L. M. 274; Grotius lib. 3, ch. 6, sect. 4; Barbey. notes on Grotius, lib. 3, c. 6.

The grounds on which the court proceeded were these:—the case depends on the law of nations and of war, and especially the laws of *postliminy*, as applied to a state of war. The law of nations is a code of moral rules dictated by reason, and agreed to by independent nations. By the laws of nature and of war, possession alone gives the right of property; nations at war are in a state of nature at least, as to the transfer of property; for however good faith and national compact

CH. 227.

The Bello  
Corrunes, 6  
Wheat. 152,  
176.

Derby v.  
Hutchinson,  
Mass. Essex,  
Nov. 1781,  
S. J. Court.  
See salvage  
for recapture,  
s. 48,  
49, 50.

Author-  
ities as to  
*postliminy*.

Vattel, lib. 3,  
c. 14, s. 204,  
208.

CH. 227. may be enforced by common consent no good reason can be assigned why any law shall continue a right of property in an enemy, after it is arrested from him by his antagonist in open war, at least as between them. Occupancy in a state of nature gives a right of dominion to exclude others. Capture and recapture, like action and reaction, mutually destroy each other, whence every right acquired by capture is lost by recapture. But on account of neutral nations, and the rights existing among men of the same nation, further rules have been agreed upon to the plain rules of natural law, compacts expressed or implied among independent nations have been added on this subject, which though not in force among enemies are in full force among neutrals, and between them and the powers at war. The *spes recuperandi* and *postliminy* are positive laws, and though reasonable, they are not a part of natural law. Their object is to continue to the last rightful possessor of goods and lands, his interest in them. Men do not favour claims to property seized by force and violence. Hence neutrals do not readily admit that property is changed by capture alone; and my government or nation does not readily admit I have totally lost my land or ship, because an enemy has got possession of either by force, and does not admit it is my fellow-citizen's coming into his hands, unless the enemy had more than mere possession, and not firm possession, not *infra præsidia*. Hence comes the doctrine of *infra præsidia*, and with some twenty-four hours' possession before stated, which affords some appearance of a legal conveyance, and extinguishes in the former owner the hope of recovery. On principles like these a title by force is not readily admitted to divest one founded in a legal purchase and peaceable conveyance. But no such principles apply to the rights of captors and recaptors, who alike, have all they have by force and violence. No law can make a distinction between a title by capture and a title by recapture; but must view the right acquired by the one as totally lost by the other, except the laws of *postliminy* intervene, which are but a part of the municipal law, made to protect to a certain extent the rights of the former owner in regard to his fellow citizens or allies in the war. They vary in different nations according to the ideas and circumstances of them. By the laws of Massachusetts the right of *postliminy* cannot extend to the captors of the Union, nor by any laws of the United States passed before March 1781. By the ordinance then passed it is clear, that the French crew of the *Astrea* are subjects of it; for when the subjects of another nation embark in the same cause, they become subjects of the laws of the country whose cause they espouse; but whether the captors are original owners within

This case,  
Derby & al.,  
confirmed, s.  
50.

Ordinance,  
March 1781.

the words, or owners within the meaning of this ordinance, CH. 227. remains to be determined, the words, *first, former, original owner*, in the law of *postliminy*, are technical terms, and in their most reasonable construction signify an owner who has a just title by just, peaceable, and lawful means, in opposition to titles laid in force and violence. The same natural notions led to this distinction in the laws of *postliminy*, and in the doctrine of the *spes recuperandi*. Therefore, as captors, recaptors, and others claiming under similar titles, can never bring themselves within the general meaning, remedies, and benefits of the law of *postliminy*, without some special clause or positive words extending to them; and none such are found in this ordinance, but the contrary appears in the face of it; judgment must, therefore, be against Collins and the other captors and in favour of the French captors.

§ 11. By the law of the admiralty the property of a ship taken from the enemy, without letters of marque, vests in the king; otherwise by the municipal law of England. And if a ship be taken on the high seas and sold on land, still all is matter in the admiralty; but when the property is brought on land the plt. may either sue in the admiralty or bring his action at common law, and always at law after the prize question is decided.

King v.  
Broom, 12  
Mod. 134.—  
4 Cranch,  
293.—4 D. &  
E. 388.—7  
Ves. 593.—  
5 Rob. 146.—  
1 Dodson, 25.

§ 12. This case shews that the Americans considered Boston a place besieged, by the laws of nations, March 7, 1776, and therefore, libelled and condemned vessels carrying supplies to British troops in Boston accordingly, as was done in this case; yet Boston was besieged by land only.

Mass. Court,  
A. D. 1776.  
Glover v.  
Brig William.

§ 13. In this case it was decided by our then Supreme Court, that where the plt. agreed to go in a privateer on a cruise and have two shares, to be received at Philadelphia, but did not sign the articles, though he went the cruise, and sued in the court of Massachusetts, he could recover but one share, and that not on the articles, he not complying with them, but on common law principles and in a common law court.

Moore's case,  
Mass. Court,  
A. D. 1776.

§ 14. In this action the court decided, that goods shipped in an enemy's country are to be deemed enemy's goods until the contrary is proved. So goods found in an enemy's ship are to be deemed enemy's goods till the contrary is shewn. So where a consignment is to foreigners, it ought to appear in the bills of lading that the property is at their risk, otherwise it is at the risk of the shipper, and therefore must be viewed as his property. And in this case of *Cleveland v. Walvart*, the libel charged: 1. That the cargo was British property: 2. That the vessel was loaded with British goods of British manufacture, by British merchants, and at a British port, and by

Cleveland v.  
Walvart,  
Mass. Sup.  
Court, 1778,  
Essex, Nov.

**CH. 227.** them freighted, insured, and risked, bound to Spain and Naples, at a time of open war between Great Britain and the United States, which the captain well knew: 3. That the captain refused to be searched and attempted to cover the property: 4. That he threw papers overboard: 5. That the vessel was carrying supplies to the fleets and armies of Great Britain. This ship was claimed as neutral Dutch property, and the cargo as Italian. The ship's papers were produced in court. And the court further decided, that it was the duty of the libellants to prove clearly the goods were enemy's property; and that when the goods are found in an enemy's ship there ought to be allowed no damages for capture and detention; that the freight must be settled and paid to the neutral according to the terms of the charterparty generally; that a ship being once an enemy's property is to be deemed his till the contrary is made to appear, and especially when loaded at his port; that if a consignment of goods be to order, and nothing more is expressed, it is to be understood the order of the shipper. The cargo was condemned. The authorities cited were, Lee on Captures, 83, 84, 89, 141, 142, 143, 201, 202, 203, 204, 205, 206, 173, 174, 190, 194, 241; Lex Mer. p. 1, 41, 42; Vattel, B. 3, c. 7. And all these eight points decided have been confirmed by many modern authorities. See Rob. Reports; Chitty's Law of Nations, &c.

Goods shipped before the war are at the consignor's risk, till delivery is allowed.  
2 Rol. R. 111, Am. ed.

The acts of Congress, March 6, 1779.

§ 15. March 6, 1779, Congress resolved that an appeal lay to Congress in all cases, as well from a decision on a fact as on the law; "that the legality of all captures on the high seas must be determined by the law of nations;" and that the admiralty court in Pennsylvania was bound to execute a decree of the committee of appeals.

January 16, 1780.

§ 16. By this act of 1780, Congress established "the court of appeals in cases of captures," to try and decide causes "according to the usages of nations," and not by jury. And by an act of Congress of Nov. 25, 1775, the appeal was to be claimed in five days after final sentence in the court below.

Act of March 27, 1781.

§ 17. This ordinance of Congress of March 1781, gave the whole prize to the recaptors after twenty-four hours' possession by the enemy. This was deemed just enough, as it operated among the citizens of the same nation, between former owners and recaptors in it, as it was a general rule of law for all persons; but this rule may be questioned, as it respected allies previously engaged in the war who did not assent to it.

Act Dec. 4, 1781.

This act of Congress defined *contrabands of war*, which were, "cannons, mortars, fire-arms, pistols, bombs, grenades, bullets, balls, fuses, flints, matches, powder, saltpetre, sulphur, carcasses, pikes, sword-belts, pouches, cartouch-boxes, saddles and bridles, in any quantity beyond the ship's use" &c.

By this list it will appear that naval stores, provisions, or any articles not immediately and peculiarly of use in war, were not made contrabands of war. This was a long act regulating captures, but generally it contained no new principles, unless its exempting from capture the goods of enemies in neutral vessels was new; and this act subjected to capture goods going to places besieged. This particularly described what property might be captured, and what not; regulated salvage, who should have power to make captures &c. The whole act was framed very much on those principles the minor naval powers have long been contending for; as to free ships, free goods, &c. in conformity to the armed neutrality entered into by Russia &c., 1780. See Garrels v. Kensington.

CH. 227.

Chitty's Law  
of Nations,  
191.

§ 18. This was an action against the deft., master of a privateer, as the bailiff of the plt. as a petty officer on board, of three undivided 174th parts of one half the brig &c., (the prizes) to merchandize and dispose thereof to the plt's. best profit, promised to account therefor on demand &c.

Thomas v.  
Newman,  
Mass. Essex  
June 1780,  
S. J. Court

The principal question in this case was, whether the privateer had made one or two cruises since she left Newburyport in August 1778, and until her return to that port. In this case, on argument, a mariner in both cruises called was admitted as a witness; and the court said, the objection that swearing one way lessened his share went only to his credibility. Whether one cruise or two was a matter of fact.

The deft. further objected, that there was no evidence he was the plt's. bailiff, or had received money to his use, nor any express promise to account,—matters essential to be proved, &c.

But the court thought it was not necessary to prove any express promise, that one might be implied by law, and the deft. being commander and having the charge of the prizes sent into Spain, made him liable. Verdict and judgment for the plt. In this case was decided a point of some importance in cases of captures, that a master of a privateer carrying prizes into foreign ports is *ex officio*, liable to account to the crew for their shares of the prizes: 2. That each of the crew may sue him for his part: and 3. That in an action by one, another is a competent witness for him: 4. If a witness be in the plt's. situation as to interest, as in this case, called by him to support it, the objection is of real weight, as it goes to his credibility.

§ 19. *A foreign condemnation changes the property, according to this case.* This case was thus:—Thomas Brown, plt. in replevin, built a schooner called the Hope, and was the owner of her, and sent her to the West Indies, where she was captured by a British privateer and carried into Barbadoes,

Brown v.  
Read, Circuit  
Court at Bos-  
ton, Oct.  
1796.

## CH. 227.

A sentence of condemnation in a foreign court of admiralty cannot be questioned for fraud in getting it ; but remains in force until avoided in some regular mode in the country where it passed.

1 Day's Ca. 142.—Ch. 40, s. 17, s. 13.—  
2 Caines' Ca. in E. 110.

A decree against partners for want of answer in a colonial court, cannot be shewn to be erroneous by a stranger to it, 4 Maule & Sel. 20, 23.

1 Wils. 211, 213, A. D. 1748, Morrough v. Co-myns.

and there libelled and condemned as prize in a Court of Vice-Admiralty ; and sold to Sheaf and Barclay, merchants, under whom the deft., Read, held her. Sheaf & Barclay chartered her to one Hutchins, who sent her to Boston, where Brown, the former owner, replevied her. The deft. pleaded property in Sheaf & Barclay, vendees under the condemnation, and traversed property in Brown, the former owner and plt., and issue thereon, and for a return avowed as master of said vessel, and having possession under Sheaf & Barclay, the said vendees, and prayed damages for the detention ; but Hutchins was not mentioned in the plea or avowry.

The court decided : 1. That Brown might prove his property by a witness, having first proved by a witness that her papers had been taken from her.

2d. That the deft. having read an attested copy of the proceedings and decree against the schooner in the said vice-admiralty court, the court here further decided that this condemnation changed the property, and therefore was a good bar to the plt's. demand.

3d. This settled distinction was taken, that a foreign judgment at common law may be examined here, and is not conclusive ; for it rests on municipal or local law, is no matter of record, but only evidence whereon to found an action on the case ; though *prima facie*, yet not conclusive evidence.

4th. But that a decree in a court of admiralty is conclusive against all the world, because courts of admiralty do not proceed by any municipal law, but by the law of nations, and the individuals of them are parties and so bound ; Dougl. 575 to 583, Barnardi v. Motteaux ; that is, as stated in Barnardi v. Motteaux, conclusive in all civil suits as to all matters within its jurisdiction, and decided by its sentence. Vent. 32 ; Ray. 800 ; Salk. 32, Broom's case. For modern cases, see Insurance. See Seizure, Ch. 224, as to all who can claim in court.

§ 20. *Condemnation relates back to the capture.* As in this action the court held, that when a prize is condemned, "the property must be considered as immediately vested at the instant the ship was taken." Wright, justice, said, that "at common law the subject in time of war was entitled to the property of whatever kind he could take from the king's enemies," and "we are to be governed by that, and not by the law of nations." This may have been anciently the rule of a common law court, but it could not be the rule of the case ; for it has been long well settled. that the rule of the case is the civil law, or law of nations and of war ; but this law agreed with the common law, or rather that with this law as to the requisites of acquiring property by capture. In this case another point material was decided according to modern

practice; that is, that the capture vests so much property in the captor, that he may after the capture sell his interest therein before condemnation, and the buyer may have his action to recover against the prize agent.

CH. 227.

In captures it is also material to know who is entitled to a share in a prize, and accordingly has a right to bring his action to recover. There appear to be but a few cases on this point. The general rule seems to be that every man on board, though a passenger only, shall have a share.

§ 21. In this case a captain of marines happened to be on board of a ship of war when she took a prize, but did not belong to her complement. Held, that he could only share as a passenger, and have one share in her prizes.

Dougl. 324,  
Wemyss v.  
Linzee.

§ 22. So the captain of a ship of war actually on board at the time of a capture is entitled to prize money, though under arrest at the time, and though another officer had been sent on board to command the ship. But this depended on the act of parliament and the king's proclamation on it. This action was case for part of a prize taken in the year 1781; Sutton's name was then inserted in the ship's books as captain, and as such he received his pay and during his arrest.

Lumley v.  
Sutton, 8 D.  
& E. 224,  
A. D. 1799.—  
Sutton v.  
Johnstone, 1  
D. & E. 493.  
—1 H. Bl. 261.

§ 23. There is a principle of law that seems to be almost peculiar to cases of capture. It is this, if a person be wrongfully taken in a prize, he is not entitled to any action or damages in false imprisonment: 2. Held in this case, also in *Lindo v. Rodney*, Dougl. 613, that the jurisdiction over all matters of prize, and every thing consequential to a capture as prize, belongs exclusively to the Court of Admiralty; this court being the proper prize court to inquire if a prize has been made according to the laws of nations and of war, courts at common law being constituted to inquire and decide only on principles of municipal law.

Dougl. 604,  
620, *Le Caux*  
v. *Eden*.—2  
H. Bl. 633.—  
5 East, 22.—  
1 Rob. 274.—  
4 Rob. 185.—  
6 Rob. 48.—  
1 Phil. Evid.  
266.

*Capture without probable cause is illegal.* As where a commander of a United States ship seized a vessel at sea without such cause, held liable, though recaptured from him by superior force. And a foreign condemnation as prize does not exclude proof of neutral property.

3 Cranch,  
458, *Maley v.*  
*Shattuck*.—  
4 Cranch, 28.  
46.

§ 24. *Neutral brigantine Hope captured.* As in the case of this prize, there have been decided many material matters, in various actions, libels, writs of error, of review, and *scire facias*, and on petitions to remove causes &c., and very voluminous special pleadings, it may be useful concisely to state the cases and proceedings, and material points decided, relating to this prize cause, or capture of this brigantine *Hope*, a Danish neutral vessel, with an enemy's cargo of 1000 barrels of flour on board, covered as neutral property, by the ship's papers.



CH. 227.

In this case our courts allowed enemy's goods to be captured in a neutral or free ship, because so they understood the law of nations was &c. s. 17, 63.

**Facts in the case.** In the year 1778, in the revolutionary war, John Cabot and others, owned the privateer *Pilgrim*, Hugh Hill, commander, duly commissioned by the American government, in their then war with Great Britain. About the middle of November, 1778, this ship captured the Danish and neutral brigantine *Hope*, Ole Heilm, master, within about four leagues of the rock of Lisbon, with the above mentioned cargo on board, supposed then to be British property. January 15, 1779, this prize, William Carlton, prize-master, arrived at St. Pierres, in Martinico. As stated in the deposition of Ole Heilm, and of Carlton, the *Hope* sailed from Cork, in Ireland, September 24, 1778, with this cargo, shipped by Denroches and Thompson, bound to Lisbon, and thence to return to Arundell, in Denmark, with a load of salt. There was also a place called Arundell, in England. Carlton was ordered for Beverly, but for want of provisions put into Martinico, and there delivered his letters and papers, found in the prize, to William Bingham, Esq. who then resided and acted there, as political and commercial agent of the United States. By his deposition, and letter of February 2, 1779, and October 6, 1779, it appeared, that on the arrival of the *Hope* at St. Pierres, Bingham took possession, and soon after sold the flour for about 140,000 livres; and, as he said, by the verbal order of Bouille, governor of the island, confirmed by his written order of October 2, 1779.

January 17 and 21, 1779, Bingham himself took the depositions of Ole Heilm and Carlton; and which, considering his situation, were admitted in evidence, though strongly objected to.

Carlton v. Bingham & trustees, State Court, A. D. 1779 &c.

In 1779, Cabot and others, owners of the privateer, brought an action on the case in trover, against Bingham, in Boston, in the name of said Carlton, as prize-master of the *Hope*, and summoned Thomas Russell and others, as his trustees. So a like action against one Irskine, his trustee. These actions were continued in the Supreme Judicial Court of Massachusetts, till February term, 1784, when a jury found Bingham not guilty of converting the said flour. The grounds of this verdict do not appear. Probably the jury considered him as acting under the government's orders of the place, so not liable in trover, an action of tort.

Act of Congress.

June 20, 1780, Congress approved of Bouille's conduct, in ordering the flour to be sold, and the monies being deposited in Bingham's hands, till the legality of the capture should be proved, (no court then being in that island to decide on such captures;) and also approved his conduct, and resolved to indemnify him as to any suits brought against him on account of the affair.

In 1793, Cabot and others brought assumpsit against Bingham in the Circuit Court in Boston, he then being in Massachusetts, for \$16,969.69 and interest, for their goods &c. sold by him, according to an account annexed, which contained said flour. Second count, *quantum valebant*, for the same. Third, 16,969.69 money had and received. And a fourth count against him as the plt's. bailiff of certain one thousand barrels of flour, which he had sold &c. Fifth count, *quantum valebant*, for 500 barrels of flour &c. Sixth count for an undivided moiety of 1000 barrels of flour, (owner's moiety.) *quantum valebant*. Demand was laid of said several sums, May 8, 1779, as a ground for interest.

CH. 227.  
Cabot & al.  
v. Bingham,  
A. D. 1793,  
Federal  
Courts.

June term, 1794, there was a verdict for the plts. on the third count for \$29,780.16 ; and as to the other counts, never promised, and judgment accordingly. To obtain the verdict, the plts. proved the flour was in their possession, and that Bingham received it, and sold it, by sundry documents &c. mentioned below.

First point  
decided.

§ 25. On this judgment Bingham brought a writ of error, returnable in the Supreme Court of the United States, and March 2, 1795, this court reversed the judgment, and held, that a *venire facias de novo* could not be issued.

Second point  
decided,  
Bingham in  
error v. Cabot  
& al.

Bingham, in the Circuit Court, had filed a bill of exceptions, in these words : " and the said William Bingham, being now here in court, by James Sullivan and Christopher Gore, Esqrs. his attorneys, the issue being joined, in the same case, and a jury on the same duly and legally impannelled, prays leave to file a bill of exceptions to the determination of the said court here had on the evidence, which, by the said Bingham, is offered in the case, and by which determination the said evidence is excluded ; and the said Bingham is denied the advantage of giving the same to the jury in the same case, viz. the several copies attested by Thomas Jefferson hereto annexed, and numbered from one to eighteen inclusively ; and also three other papers, numbered 23, 24, 25 ; all which papers had a tendency to prove, that no interest ought to be allowed by the jury on the sum for which the plts. declare in their third count, or damages for the detention of the money therein mentioned and declared on ; and by the exclusion whereof the said Bingham does sustain manifest injury and wrong, as he conceives :—and the said Bingham further files his exception to the determination of the same court, by which the papers numbered, from 27 to 36 inclusively, were excluded ; and which papers contain a complete record of the Supreme Judicial Court of the Commonwealth of Massachusetts, wherein William Carlton, who had been, as the said Bingham avers, and as appears by the evidence in the case,

CH. 227: in possession of the same flour declared on, in the said third count of the plt's. declaration, had sued in an action of trover for the same; and by which record it appears that such proceedings had been had in the same court, as would fully shew, as the said Bingham conceives, that the plts. had no legal right to change the same action, after the judgment in the same record specified, into an action of assumpsit, or as principals to implead the said Bingham again, after the cause of action had been tried, adjudged, and determined, in an action of trover, wherein the special bailiff of the plts. as the said Bingham avers, in this suit, had so impleaded the said Bingham to verdict and judgment, in the same cause of action: and that the said determination to reject the same papers is wrong; because that if the same papers are admitted to be given to the jury, the evidence therein contained, will have a legal tendency to lessen the damages, if not wholly defeat the action of the plts. :—and the said Bingham further files in this his bill of exceptions, that the court did reject and refuse to have read to the jury in this trial, as evidence, a resolution of Congress of the United States, of November 30, 1779; as also another resolution of the same Congress of June 20, 1780, both which were concerning the subject matter of his suit. Wherefore, that justice, by due process of law, may be done in this case, the said Bingham, by the undersigned counsel, pray the court here, that this his bill of of exceptions may be filed and certified as the law directs."

Signed JAMES SULLIVAN.

CHRISTOPHER GORE.

June 16, 1794, allowed to be filed by William Cushing, judge of the Circuit Court.

These papers shew the demand of the plts. arose from the sale of captured property or prize goods.

Bingham in error v. Cabot & al. points in the cause.

On *certiorari* from the Supreme Court of the United States, the record was sent up to that court; and the following errors assigned: 1. That judgment had been given for the plts. instead of the deft. below, on the third count: 2. That the Circuit Court proceeded as a court of common law, in an action on the case for money had and received &c. had no jurisdiction of the cause; the question, as it appears on the record, being a question of *prize or no prize*, or wholly dependent thereon, and as such, it was exclusively of admiralty jurisdiction; 3. That the evidence referred to in the bill of exceptions ought not to have been rejected on the trial of the cause. Plea, *in nullo est erratum*.

Prize or no prize &c.

On this point of *prize or no prize*, Bingham said, that as the action was assumpsit originally, the plts. could not recover until they had first proved the flour to be prize property; that they

must shew to whom the property belonged, and if the court CH. 227. adjudged that the proceeds of the sales were money had and received to the use of the plts., it was in effect pronouncing sentence that the vessel, (not then condemned,) was a prize. Cited Carth. 474 ; Dougl. 596 ; 3 D. & E. 344 ; 4 D. & E. 382, 394 ; 1 Dall. 221 ; 2 Dall.

Cabot & al. admitted that all prize causes and their incidents as a general rule are of admiralty jurisdiction ; but said there were some limitations to the operation of the rule. In the present case there is in fact no question of prize ; but even in cases where the question is naturally involved, the courts of common law have incidentally tried and decided it as in cases on policies of insurance and ransoms. 3 Burr. 17, 34 ; Dougl. 579, 580 ; 2 Lev. 25 ; 1 Vent. 173 ; 4 Inst. 138 ; 1 Raym. 271 ; 3 Wooddes. 450, 453 ; 2 Saund. 259 ; 2 Burr. 683, 693 ; 1 Wils. 229 ; Dougl. 310 ; 4 D. & E. 393 ; 1 H. Bl. 522.

In many cases the subject may be traced to the original question of *prize*, and the admiralty can have no cognizance of it. Suppose, for instance, a captor sells a prize, he may bring an action at common law for the purchase money ; and wherever the question of prize is at rest, the admiralty jurisdiction ceases. 4 D. & E. 393, 432 ; 2 Dall. 174 ; 3 D. & E. 342 ; 1 Burr. 526 ; Dougl. 572, 591. Admiralty jurisdiction exclusive does not depend on the question of prize ; but on the nature of the controversy, whether to be tried by the law of nations or by the municipal law. ' This is a transaction on land between the captors and their agent ; the original owners are not parties to the suit, and their right could not be set up to justify Bingham, who does not claim under them or act by their authority.'

It was admitted Bingham had made an express promise, the question of prize had been merged in it, and an action would lie against him at common law, unless a neutral claimant had interposed and forbade the payment. The prize agent is not compellable to make distribution, till the prize has been condemned. 2 Dallas, 168, 174, *Henderson v. Clarkson* ; 1 H. Bl. 476, *Horne v. Campden & al.* ; Dougl. 324, *Wemys v. Linzee* ; 2 Wils. 211 ; 1 H. Bl. 522 ; Dougl. 587. The Circuit Court adopted this reasoning of the plts.

This case on the writ of error is reported in Dallas' Reports, and the arguments from page 10 to page 42, which see at large. Judgment reversed.

3d material point, the court was divided.

Whether the Circuit Court had jurisdiction or not was a question about which the judges of the Supreme Court were divided. Cushing and Iredell seem to think it had jurisdiction, and Wilson and Patterson that it had not.

## Ch. 227.

4th, 5th, 6th,  
and 7th  
points decid-  
ed.

8th point, the  
court decid-  
ed.

Hill's libel  
filed in the  
admiralty &c.  
A. D. 1796.

2d action,  
Cabot & al.  
v. Bingham;  
also Hill v.  
Bingham,  
trover.

Condemna-  
tion on said  
libel filed by  
Hill.

Act of Con-  
gress, Dec. 1,  
1781.

9th point de-  
cided.

Supplemen-  
tary libel  
filed.

On the exception to the record the court was of opinion that Bouille's certificate ought to have been admitted; as also Bingham's letters to Congress at the time of the transaction; as also the two resolutions of Congress, and the depositions Bingham had taken in his official character, to ascertain the circumstances of the capture and the property of the vessel and cargo at the time the prize was carried into Martinico, and to shew he *bonâ fide* acted as a public agent in the affair.

Iredell and Cushing were for issuing a *venire facias de novo*; Patterson and Wilson not, because they thought the Circuit Court had no jurisdiction.

§ 26. May 8th, 1796, a libel was filed by Hugh Hill, the master, in the District Court, for himself and all concerned, stating the capture and praying for condemnation. On this libel notice was published as usual.

§ 27. The same term October 1796, the second action Cabot & al. v. Bingham; as also Hill's action of trover v. Bingham were entered. On this libel, as also on each action, a *dedimus* was issued by the court to the mayor of the city of Cork in Ireland, to take such depositions as the plts. &c. might direct.

§ 28. June term 1797, the said 1000 barrels of flour were condemned in due form of law as prize, to which Bingham's attorney made some objections, especially as to the length of the time since the capture; at this time the causes of condemnation were considered. By the above deposition it clearly appeared that the said flour was British property, and no neutral appeared to claim it. The said Hill testified that he was duly commissioned, and that he took the prize, and by the judicial proceedings at Lisbon that no such person as Don Pedro, the consignee named, ever lived there, and it became the property of the captors immediately on their seizing it and carrying it into the island of Martinico, a place of safety, and the port of an ally in the war, and then an enemy of the British nation. It was questioned if the libel was in time. By the resolve of Congress of December 4, 1781, it is provided, that captures made before February 1, 1782, might be determined at any time during the war with Great Britain, but it contains no negative words, "and not afterwards," and so held to be in time. Lee on Captures, 77, 87, 89, 90, 210, 239; Park, 78 to 87; Vattel, 2d part, 77; Burl. 223; 2 Burr. 683, Goss v. Withers & al. 1198, &c.; 2 Coke Inst. 167; 4 Coke Inst. 154; Molloy, 8, 10; Valin, 167; Emerigon, 465, 503.

§ 29. The flour being condemned as prize in the prize court to the use of the captors &c. a question was made if they must not file a supplementary libel in the same court, in order to recover the effects or avails from a third person who

held them, or if they might bring an action at common law, as above, on possession. But if as prize property, they must continue to pursue the cause in the admiralty. Authorities post. Not to lose time and to guard against a decision unfavourable to the common law process a supplementary libel was filed; but on the whole the prize question being considered at rest, as between Cabot & al. v. Bingham, that is, between owners and agent, bailors and bailee, or principals and factor, the cause was no further pursued in the admiralty; for as between such the question is to be settled by municipal law, the prize question only arising where captors and captured are concerned or a neutral claimant, or who are the captors, and to what proportion of the prize any one is entitled. 4 D. & E. 382, 401, Campden & al. v. Home in error.

June term 1797, the said Hill discontinued his action of trover. Hill's action of trover discontinued.

§ 30. June term 1797, the action, Cabot & al. v. Bingham, for \$40,000, money had and received came on to trial before Elsworth C. J. Parsons and Dane for the plts., and Sullivan and Davis for the defts. The evidence proved the facts above stated. The deposition of Stephen Webb proved a demand of the money of Bingham in July 1779, on which was claimed.

By Bingham's commission it appeared, that in 1776, the committee of secret correspondence of Congress appointed him commercial and political agent of the United States in the French West India islands, to transact such business as they intrusted to him; and by his said letter of February 2, 1779, it appeared he informed the committee of the state of this prize, viewing vessel and cargo as neutral; that he sold the flour (which was perishable) by Bouville's order &c. By Bingham's account of the sales of the flour it appeared he sold 983 barrels for

Livres 118,117. 0.0

|                                       |   |             |
|---------------------------------------|---|-------------|
| Deducting commissions, five per cent. | } |             |
| and charges                           | } | 10,495. 5.6 |

Net proceeds . . . . . 107,621.14.6

By his letters it appeared that he, July 7, 1779, credited the net balance to the said committee; but February 7, 1781, he took back this credit; and by other evidence it appeared, that he confessed he sold the 1000 barrels of flour, at 140 livres a barrel.

The plts. (Cabot & al.) relied solely on possession, and avoided the prize question, and urged that they, by Carlton, their agent and prize-master, were in possession of the property, claiming it as their own; and however the owner, if a neutral, might dispute it with them, yet Bingham, a stranger, had no

CH. 227. right to take it from them. (Not deemed necessary to use the condemnation.)

Bingham's counsel, (directed to defend by the United States,) urged, 1. That the flour not being condemned as prize, the plts. had no right to recover its proceeds: 2. That he acted under Bouille's order, and ought to keep the proceeds for the neutral owner: 3. That he in the affair acted as agent of the United States, and therefore, that they, and not he, were accountable. On all the points the court was of opinion for the plts. Verdict and judgment for them for \$33,000 damages.

10th point decided.

As to the question, *prize or no prize*, the State courts of Massachusetts had been in the practice of trying it, when it incidentally came in, as in the above cases. Not so in the middle and southern States, which have usually followed the English practice. This appears in the cases of *Campden v. Home* in error, 4 D. & E. 382; *Le Caux v. Eden*, Dougl. 594; *Lindo v. Rodney*, Doug. 613; *Wemys v. Linzee*, Doug. 324; *Smart & al. v. Wolf*, 3 D. & E. 323; *Full v. Hutchins*, Cowp. 424. So is American practice, now settled. 1 Phil. Evid. 266, 267; and cases.

Bingham in error v. Cabot & al. 11th point decided, 3 Dall. 19, 42. —3 Wheat. 591.

§ 31. On the above judgment Bingham brought a writ of error, and the judgment was reversed by the Supreme Court of the United States; because it was not expressly alleged in the writ that he was a citizen of Pennsylvania, though he was described of Philadelphia in that State, as the practice had been generally.

3d action, Cabot & al. v. Bingham in the State Court, A. D. 1798, &c.

§ 32. In March, 1798, the plts. commenced an action against Bingham in the State Court of Common Pleas, in the county of Essex, in Massachusetts, for \$45,000 money had and received. Summonses were left with his agent and attorney, he being out of the State; and on this account the action was continued to October term, 1798, when judgment was given by default for \$37,490.74 damages, and costs \$17.99.

Bingham reviewed the action.

Bingham reviewed the action in the same court, and by John Davis, Esq. filed a petition to remove the cause to the Circuit Court to be held in Boston, and filed his bond &c. After much consideration and argument, the removal was denied, on the ground Bingham was no longer deft., but had become plt. in review; and by the act of Congress, only a deft. could remove a cause from a State to a Federal court. Continued by consent for the plt. to reply specially &c. February 1, 1800, he filed his replication at great length. First plea, never promised. Second plea in replication, stated at large the proceedings in the action commenced in 1793, in bar of this action; and April term, 1800, the cause was

12th point decided.

carried to the Supreme Judicial Court of the State by demurrer. Held no bar, as a judgment reversed cannot bar another action. 1 Wils. 48, *Witham in error v. Lewis*; Cro. Car. 284, *Delves v. Clark*; and 311. CR. 227.

June term, 1800, Bingham filed another petition to remove the cause to the Circuit Court, (Boston,) referring to his petition for the same purpose, filed in the Common Pleas, and offered security &c.; his motion was overruled, and his petition not granted. Bingham then offered his two replications above stated, and the counsel for Cabot & al. objected that there could not be a double replication, and the parties agreed thus: "June term, 1800, agreed the said two pleas be filed *de bene esse*, by consent; and if the court shall hereafter determine it is not admissible for the appellant to reply double in this case, it is further agreed, that in that case the appellant shall withdraw either of said pleas at his election." 12th point decided again.

Signed JOHN DAVIS.

NATHAN DANE.

The court, on argument, decided he could not reply double to the single plea, in *nullo est erratum*. 13th point decided.

April term, 1801, the former pleading and arguments being waived, the said Cabot & al. came and defended the force and injury &c., when &c.; and said the former judgment was in nothing erroneous; *hoc parati* &c.

By Nathan Dane, their attorney.

And Bingham, reserving liberty to give any special matter in evidence &c., said the former judgment was erroneous, because he never promised the said Cabot and others; and thereof put himself on the country.

By Fisher Ames, his attorney.

And issue was joined.

November term, 1801, the cause was tried. Bingham appeared by his said attorney, and the United States by George Blake, Esq., and Cabot and others by Parsons and Dane. They opened on the ground of the former action, and by two witnesses proved the sales of the flour for 140,000 livres, and a demand of interest, as in the former action.

Bingham's and the United States' counsel urged, 1. That this is a prize cause, and that the prize question is exclusively of admiralty jurisdiction: 2. That Bingham was a public agent, and not liable to an action, and that if any one was, it was the United States: 3. That the judgment rendered in the year 1784, was a bar to this action: and 4. That all the owners of the captured property do not join in the action, as they ought to do; that is, the officers, mariners, and marines, do not join. As to the first point, *prize or no prize*, they read Dallas's reports of the former action above stated; but it



**CH. 227.** was answered and held by the court again, that the prize question was at rest, as between these parties : that this was an action of assumpsit between principal and factor, bailor and bailee, and not a prize question within the authorities in the books, which confine prize questions to cases between captors and the captured, or in which neutrals are concerned ; to cases in which the question arises, who are the captors, or what proportion of the prize the claimant is entitled to ; and especially as Bingham's counsel file in the action an authenticated copy of the condemnation, and the captor's property established ; and if this condemnation proves there was a prize question, the purpose for which now introduced by Bingham's counsel, it clearly also proves that by a regular condemnation, that question is at an end, and finally decided.

10th point  
decided  
again.

14th point  
decided.

Bingham's counsel also contended that he ought to be sued in the admiralty on a supplementary libel, to recover the property out of his hands ; to which it was answered, and held by the court, that this was necessary only when some prize question is in fact to be settled, but clearly there could be no prize question to be settled between these parties, especially after condemnation shewn by Bingham himself.

15th point  
decided.

As to the other point, it was urged by him that he acted in the affair as agent of the United States, and that Cabot and others ought to look to them, and not to him, and cited *Macbeath v. Haldimand*. To this it was answered and held, that he had no power to take private property of American citizens ; nor did Cabot and others let him have the property, trusting the government ; and that he never had paid the money to the government, after so many years, and therefore it was solely his own affair ; that the said resolves of Congress were passed while he endeavoured to make a government affair of it.

16th point  
decided.

As to the third point,—held, assumpsit lay after a judgment in trover ; as one was a contract, and the other on tort.

17th point  
decided.

As to the fourth point,—held, the owners of the privateer gave bonds to answer for the misconduct of their officers and crew on the cruise : that the owners must recover in order to make distribution, and the part they distribute to the officers and men is by agreement, a compensation in the nature of wages ; also it must be absurd to name every mariner and marine on board the privateer in the writ.

18th point  
decided.

Verdict for Cabot and others for \$34,640.35, and judgment accordingly. The former judgment for \$37,490.74, was against Bingham, and erroneous in part, to wit : for \$2,850.49. Hence he had a judgment to recover that sum against Cabot and others, with costs ; but execution stayed,

as the former judgment was no part satisfied. Here the first judgment for \$37,490.74 against Bingham, stood as it was rendered, and not affected by its being found erroneous in part; but an independent judgment was given for him to the amount of the error; and this course was essential, for the original judgment might have been satisfied by a sale of goods to third persons, or by a levy on real estate. CH 227.

§ 33. February, 1802, plts. sued out a *scire facias* from Cabot & al. v. Bingham, *scire facias*. the Common Pleas, on the judgment there rendered in 1798, for \$37,490.74 damages, and \$17.99 costs.

The writ of *scire facias* was served on David Cobb, Esq. agent and tenant, and Fisher Ames, Esq. attorney of Bingham. This action of *scire facias* was entered March term, 1802, and continued to June and to September terms, 1802, Bingham being out of the State when the writ was served.

September term 1802, Bingham by his counsel, Otis and Ames, filed a petition similar to the former one to remove this *scire facias* into the Circuit Court next to be holden in Boston, on the 12th section of the judicial act of Congress. In this petition Bingham prayedoyer of the judgment of the Common Pleas, and had it, and said that the plts. in the writ of *scire facias* ought not to have execution of the said judgment against him; then stated the above proceedings had after the judgment by default, and said this judgment was found to be erroneous, because, as above, for \$2,850.49 too much. To this petition Cabot & al. by N. Dane, their attorney, replied, that it was not erroneous, and issue joined. Cabot and others objected to this petition: 1. Because the cause had proceeded too far in the State courts, and because this *scire facias* is but a continuation of the action, and that if Bingham once had a right to remove the cause, yet when denied as he was, his remedy was to apply to the Federal court for an order of removal; but instead of this he pleaded to issue, and voluntarily submitted to a trial in the State courts, and therein had a full and fair trial on the merits; and had a verdict and judgment to recover \$2850.49, or to deduct in fact, so much out of this judgment against him of \$37,490.74, and so was entitled to an execution for the said sum of \$2850.49. Otis for Bingham contended, that the cause ought to be removed, on the ground that the *scire facias* is a new or original writ within the meaning of the said 12th section; that this writ put him as to the removal in the same situation on which he was in the original action, and before the judgment. And cited 4 Bac. Abr. 409, 433, which calls a *scire facias* an action; and Co. Lit. 290, &c. Dane on the part of Cabot & al., cited cases to shew that this *scire facias* was not a suit within the meaning of that section; that it was not an action commenced,

CH. 227. but the continuation of an action, one stage of the same action ; though a *scire facias* against bail &c. may be a new action, this on judgment is not. 1 D. & E. 389, *Wright v. Nutt* ; 6 D. & E. 282, 284 ; 2 Salk. 598, *Panton v. Hall* ; Cowp. 727, 728, *Cook v. Jones* ; and 4 Bac. Abr. 423 ; 2 Stra. 1043 ; and Cro. El. 283 ; 3 Burr. 1791, 1792, *Knox v. Costello* ; 13 E. L. c. 45 ; 3 Salk. 321, *Adam's case* ; 3 BL. Com. 421 ; 2 Salk. 600 ; Cro. Car. 286, 300 ; Hob. 72 ; 4 Bac. Abr. 409, 423. This petition to remove the cause was denied, and Bingham moved to continue the action in order that he might plead in bar of an execution. The action was continued.

19th point  
decided.

And December term 1802, Bingham put in his plea, stating at great length all the proceedings in the action in the State courts from March 1798, and averred that the several promises and cause of action recited by him in his plea of review, were the same promises and cause of action on which the said judgment on default in the said original action, on which this writ of *scire facias* hath issued, was rendered ; and that said issue joined as aforesaid, was on the validity of the said former judgment ; and that the same judgment appears by the verdict aforesaid to be erroneous, and hath been considered and adjudged by the court to be erroneous, all which he is ready to verify, wherefore he prays judgment, whether execution shall be awarded against him upon the aforesaid erroneous judgment, and for his costs. AMES and OTIS.

20th point  
decided.

To this plea there was a general demurrer by N. Dane, and joinder. Judgment that the plea was bad, and that the said Cabot and others have execution and costs. Bingham appealed to the Supreme Judicial Court of the State, holden third Tuesday of April 1803. In that court there was a like judgment that the plea was bad, and for execution and costs.

21st point  
decided.

And the court decided, that, though the judgment was too large it was not erroneous in the sense of error on a writ of error, nor was there any reversal of any part of the said judgment, but it was the evident intent of the Supreme Judicial Court, that that judgment should stand and be executed, and that Bingham should have his remedy for what was too much or too large, to wit, \$2,850.49, by a judgment and execution in his favour for that sum ; but that the said judgment was erroneous only in the sense of *proceedings in review* in Massachusetts, in which, if judgment be too large it stands in force, and any levy on it remains good ; and the remedy is by a cross judgment, and execution for the difference or surplus sum.

After this twenty-five years litigation thus pursued and ended, Cabot and others took out their execution and levied

it on Bingham's new lands in Maine, and finally obtained their money, principal and interest for this flour. CH. 227.

§ 34. A capture authorized by the rights of war transfers the property; but these rights take place only among enemies. Hence a capture gives not these rights, but where the property captured belongs to an enemy. He that founds a claim on these rights must prove that peace was broken by some national hostilities. *Prize* usually signifies legal capture, and the act of Congress must be viewed as adopting that sense of the word. The municipal law of a country cannot change the law of nations; and by that a neutral subject whose property has been illegally captured may pursue and recover it, in whatever country it is found, unless a competent court has adjudged it prize. 2 Dallas, 2 to 38, Miller v. Miller.—Marten's Law of Nations, ch. 8.—2 Burr. 693.

The legality of a capture is ever open for examination, notwithstanding the length of possession, till a competent court has decided it. Possession and occupation in questions of property ought to have the same influence in courts of admiralty as in courts of common law, a good title, and conclusive on all the world, except the right owner. Ship and cargo, originally neutral property, were captured and occupied by a British privateer twenty-four hours; this did not change them into British property, so as to make it prize on a recapture by an American privateer. As to condemnation, Marten, 323. A subject cannot divest himself of the obligation of a citizen. 2 Dallas. But he may capitulate if his government can no longer protect him.

§ 35. The ordinance of Congress founded on the Russian armed neutrality, declared that effects belonging to the belligerent powers should not be captured on board of neutral vessels,—included effects of Great Britain. s. 63. 2 Dallas, 18.

§ 36. On a capture and libel as prize the *onus probandi* lies on the captor: and 2. A libel by the crew of a privateer for their respective proportions of a prize, is the proper and regular mode of redress: 3. Where the prize proceeds are in the marshal's hands the parties entitled to them may either institute a supplemental libel in the admiralty, or bring an action at law for money had and received: 4. If he makes distribution without the admiralty court's order, he does it at his peril: 5. The court before issuing the order of distribution will guard against fraud and imposition, by providing for latent claims: 6. The right of a privateer's crew to capture is founded on her commission, not on the articles of agreement: 7. This right cannot be destroyed by the captain's putting the mariner on shore. *Keane & al. v. Brig Gloucester*. 2 Dallas, 23, 37, 38, 39.

§ 37. Immediately on a capture as prize the captors acquire such a right as no neutral nation can justly impugn or 2 Dallas, 189, 196, M'Donough v. Danery.

CH. 227. destroy. See the effect of their abandoning their prize at sea as derelict.

2 Dallas, 174.  
Henderson v.  
Clarkson.

§ 38. After a decree of condemnation in the admiralty, and the money is actually in the marshal's hands, an action lies at common law for the agent of the mariners to recover their shares of the prize money; for, after such condemnation the property is vested, and the question, *prize or no prize*, is no longer material.

4 Cranch, 28,  
Jennings v.  
Carson.

§ 39. A privateer captures neutral property, held the owner of her is not answerable for restitution, except where the property or proceeds come into his hands. And if a captor fails to libel a captured vessel, the owner may claim her in a court of admiralty. But the owners of a privateer are answerable to all the world for the conduct of their agents, the officers and crew, for the full amount of the injury done. 3 Dallas, 393; 6 Wheaton, 194.

1 Cranch,  
103, United  
States v.  
Schooner  
Peggy.

§ 40. A final condemnation in a court of admiralty, where a right of appeal exists, and has been claimed, is not a definitive condemnation within the meaning of the 4th article of the convention of France, signed September 30, 1800. How a treaty made pending a suit, operates upon it.

2 Dall. 20,  
Miller v.  
Miller.

§ 41. After Great Britain commenced hostilities against Holland, the British king, by proclamation, declared Dutch vessels, carrying the produce or manufactures of Dominica, should not for a limited time, be liable to capture. Held, this only exempted them from British captures; but did not restore the neutrality of Holland, nor prevent the rights of war, in favour of other nations, who should recapture Dutch vessels from a British privateer.

4 Cranch,  
614.—6  
Cranch, 329,  
Schooner  
Rachael v.  
United  
States.—6  
Cranch, 208.

§ 42. *A sentence of condemnation is necessary to divest the property.* No sentence of condemnation can be affirmed, if the law has expired under which the forfeiture has accrued, though a condemnation and sale have taken place, and the monies paid to the United States before the law expired; and the court above in reversing the sentence, will not order the money to be repaid, but the property to be restored, as if no sale had been made. See *Yeaton & al. v. United States*. No seizure can be after the law is expired.

7 Dall. 95,  
case of Tal-  
bot.

§ 43. In cases of capture from enemies, persons in other vessels acquire no right, merely by seeing the capture made.

2 Dall. 40,  
Beare & al.  
v. Schooner  
Speedwell.

§ 44. A vessel captured after the preliminary articles of peace cannot be condemned. A prize schooner in a perishing condition, ordered to be sold, on the appellant's motion, before the appellee appeared.

2 Dall. 15,  
Miller v.  
Miller.

§ 45. America was bound, as the ally of France, by the capitulation between Great Britain and France, for the surrender of Dominica; and all captures afterwards made by

America, any way relating to that place, were governed accordingly. CH. 227.

46. An American citizen, under a foreign commission, captured a vessel from a belligerent, and set up an act of expatriation; but it was adjudged the capture was unlawful, and the court decreed restitution. See *Alien*, Ch. 131; and *Admiralty*, Ch. 186, a. 9. 3 Dall. 133 to 169, *Talbot v. Janson & al.*

§ 47. The right of seizing and bringing in a vessel for further examination, does not excuse or authorize any spoliation or damage done to the property; but the captors proceed at their peril, and are liable for all the subsequent injury and loss: 2. What is a sufficient probable cause for so seizing it: 3. The owners of a privateer are responsible for the conduct of their agents, officers, and crew, to all the world; and the measure of such responsibility is the full value of the property injured or destroyed. See Ch. 224, a. 11, s. 6. 3 Dall. 333, 334, *Del. Col. v. Arnold.*

*Salvage in cases of recapture.*

§ 48. Salvage was allowed a ship of war of the United States for the recapture of a Hamburg vessel out of the hands of the French, (France and Hamburg being neutral to each other,) on the ground she was in danger of condemnation, under the French Arrêt of January 18, 1798. The *Apollo*; *Wheaton on Captures*, 239. Generally no salvage is due for the recapture of neutral vessels; and so is the French law. 1 Cranch, 1, 44, *Talbot v. Seeman*.—1 *Dodson*, 106, 186, 253.

§ 49. To support a demand for salvage, the recapture must be lawful, and a meritorious service must be rendered. Probable cause is sufficient to render the recapture lawful. 9 Cranch, 244.

§ 50. Where the amount of salvage is not regulated by positive law, it must be settled on principles of general law: 2. To entitle to salvage in cases of recapture, it is not necessary that the means used should be with that sole view: 3. The rule that salvage is not due for the recapture of a neutral, is founded on the fact that no benefit has been conferred; but according to the case of *Talbot v. Luman* above, the fact may be proved that the recaptors have done the owner of the vessel a benefit, though they have only recaptured her from his friends, and not his enemies, as neutrals. 2 *Rob. R.* 246; 3 *Do.* 141; 4 *Do.* 127. 1 Cranch, 36.—2 *Wheat. R. App.* 40 to 49.—*Marten*, ch. 3, p. 107, 146.—*Asuni*, part 2, ch. 1.

If the weaker party, before he is overpowered, obtains relief from the arrival of fresh succours, and is preserved from the force of the enemy, this is properly a rescue; and to effect such rescues is the duty of fellow subjects and allies, whenever there is a reasonable prospect of success. *Schooner Adeline*. Chitty's Law of Nations, 91, 92.—9 *Cranch*, 244, 288.—2 *Wh. App.* 40 to 49.—3 *Wh.* 88 &c.

There may be a statute regulating the rate of salvage in the cases of recapture among the citizens or subjects of the Chitty's Law of Nations, 104, 107.—1 *Rob. R.* 271.—*Doug.* 648:

CH. 227. same nation, or treaties or conventions among the parties in the recapture ; but if no such statutes &c., or parties are concerned in recaptures, not parties to such treaties or conventions, then the rate of salvage is regulated by the law of nations ; that is, a reasonable allowance. See post.

2 Wheat. R. App. 41, 49. As to acts of Congress, respecting prizes and recaptures in the revolutionary war, see s. 15, 16, &c. Rate of salvage is discretionary. 1 Rob. R. 32, 42.

Act of Congress, March 3, 1800.— See Wheaton on Captures, 230 to 251.— 3 Wheat. 78, 93. This act of March, 1800, varied the rule as to salvage in cases of recapture ; and provided, " that in cases of recapture of vessels or goods belonging to persons resident within, or under the protection of the United States, the same not having been condemned as prize by competent authority, before the recapture, shall be restored, on payment of salvage of one eighth of the value, if recaptured by a public ship, and one sixth, if recaptured by a private ship ;" and if the vessel recaptured, be " set forth and armed as a vessel of war," before such recapture, then the salvage to be one moiety. Some variations in a few special cases. Cases decided, 9 Cranch, 244 ; 4 Dall. 34 ; 1 Cranch, 1 ; 3 Dall. 188 ; 4 Cranch, 393 ; 8 Cranch, 221. General salvage in cases of recapture, is regulated thus by municipal law, or by treaties ; but where not, salvage to the recaptors must be regulated by the laws and usages of nations ; as by these the property vests fully in the captors, by firm and secure possession ; after this exists, there can be no salvage on recapture, as paying it, the original owner has no right to claim. As to what is such possession, as already observed, different nations have different notions. Some few hold to 24 hours, or the pernoctation rule ; but seven eighths, at least, to the doctrine of *infra praeidia*. The principle admitted, the application of it rests in sound judgment. It seems many eminent jurists in Europe think the rule of pernoctation is as *infra praeidia*. 1 Dodson, 105, 185. So was once the English rule ; though that now is condemnation, as to aliens,—as to British subjects, till fitted out as a vessel of war. Statutes 33 Geo. III. c. 66 ; 43 Geo. III. c. 160 ; 45 Geo. III. c. 72. In the United States, as before stated, as to persons residing in them, as to others, condemnation ; as to other original owners, it is the rule *infra praeidia*. Hudson v. Gues-tier, 4 Cranch, 293 ; 2 Burr. 694, 1208 ; 1 Edw. 186 ; 9 Cranch, 244, 288. Different salvage on our said statute, as to cargo and vessel ; this half, that one sixth &c. As to what is setting forth and arming the captured vessel, see 2 Wheat. Appen. 43, 44. As where a hostile ship was captured, then recaptured by the enemy, then recaptured from the enemy ; adjudged wholly to the last captors. 2 Wheat. App. 46 ; 4 Rob. 217. An interest acquired by possession in war, is lost

Master and crew are the only salvors, 1 Rob. R. 150, 228.

Derby & al. s. 10, confirmed, 1 Wheat. 125, 130, Astrea's case in Georgia, &c.

by loss of possession wholly ; as that acquired by capture, is totally lost by recapture. Here Americans were the first captors, and Americans the third. In *Derby v. Hutchinson*, s. 10, Americans were the first, and the French allies in the war the third, but this made no difference. CH. 227.

November, 1811, the French captured the American brig *Three Friends*, bound from Salem to Brazil, with a valuable cargo, and burnt her. Same month the French captured the British brig *Adventure*, and cargo, took a part of it, and gave her and the rest of it to the officers and crew of said American brig, who brought the *Adventure*, February, 1812, into Norfolk, and libelled in Virginia as their property. The United States claimed under the non-importation act. Pending the suit, war took place between them and Great Britain. Held, 1. A case of salvage, one moiety to the salvors, and the other to remain subject to the future order of the court, to be restored to the British owners at the end of the war, if not previously confiscated by some legislative act, confiscating enemy's property found in the United States at the commencement of the war ; no breach of the non-importation act : 2. Though the French capture of the *Adventure*, as between belligerents, clearly divested the property out of the British owners, yet the *Adventure* remained liable to British recapture, till she arrived in the United States : 3. In them the libellants sunk into mere bailees for the British claimant, with a right to civil salvage.

Wheaton on  
Captures,  
244, 247.—  
8 Cranch,  
221, The brig  
*Adventure*.

Recapture may be by persons not commissioned, and they may be entitled to salvage. It is not as prize. To recapture is the duty of all fellow-citizens. 3 Rob. 224. There must be a capture in order there may be a recapture. 4 Rob. 147. But a capture is made often without gaining actual possession. It is made when the thing is completely in the enemy's power. 3 Rob. 305. So a recapture may be without bodily actual possession. If the first captors voluntarily abandon their prize, and others recapture or take her, she is theirs. 1 Edw. 79. But this means *quoad* the first captors. And see the *Mary Ford's* case. But if the abandonment be involuntary, and produced by the terror of superior force, the first captor's right is revived. As where a British vessel, in 1814, was captured by an American privateer, the *Cadet*, which took out most of her cargo. Soon after another American privateer, the *Paul Jones*, appeared near by, under British colours, and was by the *Cadet* supposed to be British. The *Cadet* quitted the *Mary*, and the *Paul Jones* captured her, within half a mile of the United States ; her prize-master and crew having quitted her, thinking the *Paul Jones* was an English cruiser. The *Mary* was adjudged to the *Cadet*, with damages and costs. 2 Whea. App. 45, 46.

2 Whea. 123.



## CH. 227.

1 Rob. 50.—  
9 Cranch,  
244, 288.—  
4 Dall. 31.—  
1 Cranch, 1.

2 Cranch,  
170, Little v.  
Barreme.

3 Cain. 120.  
—2 Cranch,  
64, 125, Mur-  
ray v. Charm-  
ing Betsey.—  
1 Cranch, 1.  
—3 Cranch,  
458; see s.  
23.

1 H. Bl. 261,  
268, John-  
stone v. Mar-  
getson.

1 H. Bl. 264,  
Taylor v.  
Pawlett.

4 East, 238,  
260, Nelson v.  
Tucker, in  
error.

If an armed vessel recapture a vessel, owned by her allies in the war, from the common enemy, the rule of salvage is on the ground of reciprocity; that is, the recapturing vessel has salvage, as to time and amount, as the ally exacts whose vessel is recaptured; our courts also practise on this principle. Where salvage is merely discretionary, an appeal is not to be encouraged. 4 Wheaton's R. 98, 99.

§ 51. *Captures or seizures by public officers.* (See Seizures at large, Ch. 224.) The instructions of the President of the United States to a commanding officer of a United States ship of war will not justify the officer if these instructions be not warranted by law; *secus*, if legal instructions.

§ 52. Nor is the commanding officer of such a ship justified, who seizes and sends in a vessel, if there be no reasonable grounds of suspicion that she was trading contrary to law, and the officer is liable for damages to the owner of such vessel. An American vessel was sold in a Danish island to a person born in the United States, but who had *bonâ fide* become a burgher of that island, and sailing from thence to a French island in June, 1800, with a new cargo purchased by her new owner and under the Danish flag, was seized by such commanding officer of a United States ship of war. Held, this vessel was not liable to seizure under our non-intercourse act of February 27, 1800; and hence the officer liable for damages for the seizure or capture: 3. Held, the report of assessors appointed by the Court of Admiralty to assess damages, ought to state the principles on which it is founded, and not a gross sum without explanation: 4. What degree of arming constitutes an armed vessel. See Rights of Domicil, s. 58.

§ 53. During the war between England and Spain in 1780, &c. a flag officer on a certain station gave orders to a ship under his command to sail on a cruise; and after the orders were given, but before the prize was taken, he accepted another command, but no other flag officer was appointed to succeed him on his former station. Held, he was not entitled to one eighth of a prize taken by the ship, which sailed in consequence of his orders, under the proclamation for the distribution of prizes; for the appointment of the plt. to another command amounted to a determination of his command on the Lisbon station, as to which his said order was given; the new appointment being accepted, then he ceased of course to be commander on the Lisbon station.

§ 54. The same principle if a commanding officer be superseded on his station between giving his orders and the capture of a prize. And Pigot v. White, 1 H. Bl. 265; 3 Rob. R. 54.

§ 55. So the actual commanding officer on the station at the time of the capture, has the commander's eighth part of

the prize, and not the superior commander retired on account of his health, though he remains in commission and pay &c. CH. 227.  
 As where the king's proclamation for the distribution of prizes, was, that a flag officer returning home from a foreign station should have no share of the prizes taken by the ships left behind to act under another command. And when Lord St. Vincent, a flag officer, commander-in-chief in the Mediterranean, returned to England by leave of the admiralty, for the recovery of his health, leaving the fleet under the command of the next flag officer in seniority, Lord Nelson, but having before his departure despatched one of the fleet on a cruise, who made captures within the limits of the station after Vincent's departure homewards out of those limits, but before any new orders given by the next flag officer on whom the command of the station had devolved; held, Lord St. Vincent was not entitled to the eighth of the prizes so taken, though he retained his title, pay, and table-money, as commander-in-chief after his return home, and did not resign his commission as such commander, until after the prize was taken, and though he had official correspondence with the admiralty in that character till his resignation, and made appointments in the fleet as such commander. But this eighth of the prizes for taking or commanding flag officer's share, belonged to the said next flag officer, the *acting flag officer*, for all effective purposes of the fleet at the time of the capture; the true principle of the proclamation being, that the reward of prize should attach to the present effective commander on the station, and not to the nominal one, who returns home, leaving ships behind to act under another command. The proclamation provided, that a flag officer actually on board, "or directing and assisting in the capture," should have this eighth. Original case in the C. P. 3 Bos. & P. 257, &c.

§ 56. In this case it was decided, that the principle in the above case (in fact that of common law) will hold, though the superior officer before his departure directed the inferior to take under his command those ships only which continued with him at the principal station, and the detached squadron when they returned to the same place after the particular service performed, for the performance of which he had before limited a time; and though such superior officer's commission was to command in chief a squadron upon a particular service, and not merely upon a particular station; at least such superior was not entitled to recover such share from the inferior who had received it. See also on this point, 6 East, 220, &c.

4 East, 262,  
270, Keith v.  
Pringle.

§ 57. *Shares in prizes—what number, when forfeited, &c.*

CH. 227. See the cases of *Moore, of Thomas v. Newman, Wernys v. Linzee, Lumley v. Sutton, Sutton v. Johnstone, Johnstone v. Margetson, Taylor v. Pawlett, Pigot v. White, Nelson v. Tucker, Keith v. Pringle, &c.*

12 Mass. R.  
576, *Loscomb v. Prince & al.*

The principles decided in this case were : 1. That an officer or mariner may be entitled to his shares in captures made before he is legally confined for some crime : 2. But not in the capture made while he is so confined : 3. If a part of the articles of the ship be that he forfeit his prize money for mutiny, or other crime, as the officers shall adjudge, he does not forfeit his share of prize money but when they in proper form pass sentence : 4. The decision of a regular court martial condemning him according to law, of mutiny or other crime, is sufficient proof of legal confinement : 5. The sentence was limited to corporeal punishment, and so did not affect his right to shares, for this punishment must be considered as the whole penalty this court imposed : 6. It results the said officer's right to recover his shares must be according to his services on board the privateer ; they were duly performed till he was confined, and while confined and legally, he performed none : 7. The wages of seamen may clearly be apportioned, as, to the time one dies, or leaves the ship without any fault.

§ 58. *Who is such a hostile character that his property is liable to capture or not &c.* According to modern refinements one may be an Englishman, and yet his property be liable to be captured by Englishmen, either on account of his residence or of the situation of his property ; and this when the character is hostile only to commerce. If England and France be at war, and an Englishman, even residing in England, has a plantation in a French island, its produce is liable to capture by Englishmen, though shipped in time of peace ; because as to this plantation the Englishman has permanently incorporated himself with the French interests ; as a holder of the soil is to be viewed as a part of France in this particular, independent of his personal residence or occupation, because "the possession of the soil does impress upon the owner the character of the country, as far as the produce of that plantation is concerned in its transportation to any other country, whatever the local residence of the owner may be." The produce of the hostile soil bears a hostile character. So an American citizen residing in a Danish island, a foreign country, may acquire the commercial privileges attached to his domicile ; and by making himself a subject thereof and swearing allegiance thereto, while there he is out of the protection of the United States. 2 Cranch, 64 to 125, Murray's case.

So "while an Englishman resides in a hostile country he is a subject of that country." And a settlement in a hostile

5 Rob. R. 161.  
—Chitty's  
Law of Na-  
tions, 32, 35.  
—Ch. 224, a.  
9, Bentzen's  
case.

5 Rob. R. 21,  
case of the  
Phoenix.—  
See Ch. 224,  
a. 9, s. 11.

5 Rob. R. 277.  
—3 Rob. R.  
12, 22.—3  
Bos. & P. 113.—5 Do. 95.—4 Rob. R. 107.

country by residence, or by maintaining a commercial establishment there, impresses on the person so settling the character of the enemies among whom he settles, in regard to such of his commercial transactions as are connected with that settlement. As where J. Elmslie, born a British subject, went to the Cape of Good Hope in the war of 1775, and had been employed as an American consul there, and in the war between England and Holland; held his property, as it related to that settlement, was liable to capture by Englishmen, though claimed by him as a subject of America;—case of the ship *President*. So an American having a house of trade and living at Curaçoa, then a Dutch possession, was deemed to be a Dutchman, and his property as it related to that house, liable to be captured by the enemies of the Dutch. So Mr. Miller, an American consul, residing at Calcutta was deemed a British subject for various commercial purposes; he must take, said the judge, his situation with all its duties, and among other duties, the duty of not trading with the enemies of England. “So a person living *bonâ fide* in a neutral country is fully entitled to carry on a trade to the same extent as the native merchants of the country in which he resides,” not inconsistent with his allegiance.

§ 59. *As to what constitutes a residence.* Being in a place with intentions to remain in it are the essential matters. And when one is in a place, the presumption is, that he is there *animo manendi*, and then he must explain it; even a residence of one or two days with such intention is sufficient; Diana’s case;—but not without such intentions, though the residence in fact be for some time. Ocean’s case. As to christians residing in Turkey, or the East, it is rather the factory than sovereignty that gives the character to the resident; as in those countries a christian usually remains a stranger to the natives. As if a Swiss, by birth, continue to trade in a French factory in China, he is to be viewed as a Frenchman. And if a consul carry on any commerce, he is a merchant *quoad* that; and if one be resident with a voluntary intention to remain, a temporary absence makes no difference.

§ 60. And often this residence may be by an agent. As where the principal is a privileged trader of the enemy, and views himself as being virtually a resident of the country where in fact his agent resides, and is the mere deputy, and not factor of the principal; as the case of a consul acting by vice consuls.

§ 61. If a person enter into a house of trade in the enemy’s country in a time of war, or continues that connexion during the war, he does not protect himself by mere residence in a neutral country, but he is impressed with a hostile character,

CH. 227.

See Ch.

224, a. 9, s.

19; other

cases of dom-

icil in this

chapter.—2

Rob. R. 264.

—4 Do. 188,

191, Am. ed.

4 Rob. R. 107.

—3 Rob. R.

17 to 35, case

of the Indian

Chief.—Chit-

ty’s Law of

Nations, 32,

39—1 Rob. R.

296.—4 Rob.

R. 255.—2

East, 234.

1 Rob. R. 102.

—5 Rob. R.

60, 90, 98,

297.—

1 Campb. 76.

Chitty’s Law

of Nations,

41, 54.

3 Rob. R. 27.

4 Rob. R.

107, 119,

232.

3 Rob. R. 41.

**CH. 227.** with reference to so much of his trade as may be connected with that establishment. And the rule is the same whether he maintain that establishment as a partner, or a sole trader, and his property may be captured accordingly. But in all these cases the residence affects only the particular trade connected with that residence or establishment. As if A has his personal domicil at Embden, where he resides and has a house of trade, and he is only connected with England by his partnership in a house in London, secondary to his house at Embden, he may trade with the enemy of England at his house at Embden, if his trade there do not originate from his house in London, nor vest an interest in that house. Case of the *Portland &c.*, Jacob Ostermeyer's domicil.

3 Rob. R. 41.  
—1 Camp. 76.

Chitty's Law of Nations, 56, &c. 100, &c. 154 to 159.—2 Rob. R. 41, 49.—6 Rob. R. 72, 250.—Chitty's Law of Nations, 159 to 166, 176 to 183.—4 Rob. R. 107, or 88.—5 Rob. R. 161.

§ 62. *Colonial trade.* One may be of a hostile character by engaging in those branches of commerce usually confined to the subjects of the adverse belligerents themselves. As where the English, for instance, have long confined their coasting trade to their own subjects, and England is at war and lets a third party into this trade, his property in it is liable to capture by her enemy. The case of the *Princessa*. The same principle holds in regard to a nation's colonial trade, according to the English and most authorities of late years, and especially the rule of 1756, the third party thus let in has the benefits of native subjects, and so is viewed as liable to their losses, and deemed an enemy. Case of the *Anna Catharina*. And if one so let in assign his benefits to others, they become such enemies. Relaxations of the rule of 1756. Chitty's Law of Nations, 166; 2 Rob. R. 1, 84, 115, 119, 156; circuitously is legal, 295, Am. ed.; 3 Rob. R. 36, 71, 154, 188, 267, Am. ed.

5 Rob. R. 2.  
—Chitty's Law of Nations, 68, 60, and 118.

§ 63. *So a hostile character may be affixed to one's property by his sailing under an enemy's flag and pass, and his documents.* As to the vessel at least,—she is presumed to belong to the nation whose colours she assumes; and as she has the benefits of her assumed character she must bear its inconveniences. This principle is not extended to the cargo by the English, if by the other nations. A ship's documents received from a government, stamp its character on her; but goods have no such dependence on the authority of the state. And according to Vattel the immunity of neutral cargoes on board an enemy's ship is clear; but the goods of an enemy in a friend's ship may be captured, but the neutral has his freight. See also, *Il Consolato del Mare*, ch. 273; Grotius B. et P. lib. 3, c. 1, s. 5, and c. 6, s. 6; Bynkershoek *Quæstiones Juris Publici*, lib. 1, c. 14; Voet *de Jure Militari*, c. 5, s. 21; Loccenius *de Jure Maritimo*, lib. 2, c. 4, s. 12; and many treaties. But on the point of taking enemy's goods out of a friend's ship treaties are both ways, and the northern

Vattel, lib. 3, c. 7, s. 107, 115.—Chitty's Law of Nations, 118, 302, 313.—1 Molloy.—5 Rob. R. 82.—6 Rob. R. 52.—6 Rob. R. 24, 41, 358, London Packet.—1 Rob. R. 107.

powers of Europe often, and the United States at times, have denied the right; and, s. 35, s. 24, admitted it. Goods found in an enemy's ship, raises a presumption, they are enemy's goods. 5 Wheat. 132, 144. CH. 227.

In our treaty with Spain of 1795, was contained the doctrine *free ships make free goods*; but in the case of the Amiable Isabella, a Spanish vessel and cargo as claimed, the Supreme Court of the United States decided, that this provision was inoperative, because the form of the passport was not annexed to the treaty, as was proposed in it that it should be. Hence this vessel sailing under Spanish colours, and her cargo, were liable to be proved British and enemy's property. But the judges were not unanimous in this very important decision; all however, seem to agree that had the said form been so annexed and her papers furnished accordingly, they and the Spanish flag would have excluded even examination if enemy's property or not. Held, 2. Whether a capture be made by a captor duly commissioned, or not, is a question between him and the government, with which the claimant has no concern; if not commissioned, the government may contest the right with him after condemnation and before distribution: 3. By the rules of the prize courts, he who claims a neutral interest must prove it: 4. The first evidence is from the ship's papers and the persons captured. Further, see Baring & al. v. Christie, 5 East, 398 to 406, as to passports; the Pizarro, 2 Wheat. 227 to 248, do.; Darby v. Estein, 2 Dall. 35, as to fraud and collusion; the Cittade de Lisboa, 6 Rob. 358; Do., the Elsebe, 5 Rob. 173; the Hunter, 1 Dodson's R. 4; the Franklin, 2 Acton, 106; 2 Bin. 308. The Nueva Anna and Liebre, the Spanish consul claimant. The court said, it did not recognise the existence of any lawful court of prize at Galveztown, nor of any Mexican republic or state, with power to authorize captures in war.

§ 64. *Property cannot be transferred in transitu as it respects belligerents*; but remains as at the time of the shipment till the actual delivery in time of war, though not in peace; and such transfer may be good in time of war, if made *bonâ fide* in contemplation of peace on reasonable grounds. Captors by the right of war stand in the place of the enemy, and are entitled to such of his property, as they can seize not on neutral ground. 1 Rob. R. 90; 1 Rob. R. 208, Am. ed., and 283; 4 Do. 170.

§ 65. *The right of belligerents to capture each other's property.* Never a war for arms and a peace for commerce. The enemy's commerce in all ages has been considered as the legitimate prize of war. Says Professor Marten, "the conqueror has a right to seize on the property of the enemy

6 Wheat. 1 to 102. Munos, claimant, libelled by the American captors.—See in this case many documents and papers are printed, and many cases and authorities cited; a large part of which are cited in this chapter and Ch. 224; and the Odin, 1 Rob. 227.

6 Wheat. 193, 194.

3 Rob. R. 197.—1 Burr. 147.—5 Rob. R. 161, 300.—1 Rob. 1, 101, 122.—2 Rob. R. 133.—4 Rob. R. 107.

In Potts v. Bell, 3d lib. Grotius, c. 6.—3 Vattel, ch. 8, 9.—Marten, lib. 8, ch. 3, s. 9.

CH. 227. whether moveable or immoveable," (and reasons stated.) But, says Vattel, lib. 3, c. 4, s. 63, the sovereign can neither detain the persons nor property of those subjects of the enemy who are within his dominions at the time of the declaration of war; they came into his country under the public faith, and an implied promise of his protection. But some render this just and certain rule in itself, ineffectual, at least vague and uncertain, by holding that certain hostile acts previously committed amount to this declaration of war, and therefore justify embargoes on the other party's vessels &c., laid after these acts and before the formal declaration, in the end made civil embargoes, if matters be accommodated, and if not hostile or warlike, attended with confiscation of the property embargoed. Warlike embargoes are enforced against enemies, and civil ones against allies and subjects.

Skinner, 98,  
336.—Salk.  
32.—Beawes,  
277.—4 Mod.  
177, 179.—3  
Inst. 162.—  
1 Rob. 114.—  
1 Bl. Com.  
c. 7.

1 Bl. Com.  
251.—Stat.  
4 H. V. c. 7.  
—Chitty's  
Law of Na-  
tions, 73, 82.

5 Rob. R.  
360.—2 Rob.  
R. 224.—11  
East, 619.

Vattel, lib. 2.  
c. 18, s. 242,  
344.

1 Bl. Com.  
ch 7.—Gro-  
tius, lib 3.  
c. 2.—Vat-  
tel, lib. 2. c.  
13.—Magna  
Charta.—  
Bac. Abr.  
Merchant.—  
Stat. 27. Ed.  
III.

§ 66. *Letters of marque and reprisals.* Power to issue them can be well vested but in the sovereign; and no private sufferer ought to be a judge in his own cause. The king issues them in England. Here under an act of the Federal legislature, and in a form prescribed by law. May be revoked by a peace, by a truce, or by letters of safe conduct; or the grantee may forfeit them by misconduct. 5 Rob. R. 9. They are of a nature municipal, and no citizen can receive such from a foreign sovereign or state. A letter of marque issued against one nation may be used against another, when war is declared against it. Case of the *Sacra Familia*. Not necessary in cases of recapture. The Hellen's case. And before condemnation the king can release a prize.

*Reprisals*, says Vattel, are "used between nation and nation, in order to do themselves justice," not otherwise obtainable. May be for refusing to pay or secure a debt &c.; and when the hope of obtaining justice is gone, the thing seized is usually confiscated and sold; and going to war is viewed as a refusal to do justice. In reprisals the property of the subject is seized, as well as that of the state, except that intrusted to the public faith, as money placed by foreigners in the public funds in modern practice in most nations. Reprisals are by embargoes, or by letters of marque and reprisals. These words, "*marque and reprisal*," are synonymous, and mean, taking in return. By this commission, the grantee may seize the bodies and goods of the subjects of the offending state, and detain them until satisfaction is made. But according to Molloy, B. 1, ch. 2, s. 18, ambassadors, men travelling for religion, students and their books, and women and children, are exempted by the civil law. So those temporarily in a country. And by the canon law all ecclesiastical persons are expressly exempted. 1 Bl. Com. 259.

§ 67. *Right of capture at sea &c., and mainly the exceptions to the general right.* On the broad principle of national law, all the commerce of an enemy abroad is liable to capture. The exceptions are on two principles: 1. In favour of neutral territory: 2. Relaxations of the nation having the general right to capture as matters of indulgence, not of right, as by protections, licenses, and exceptions in favour of small fishing vessels, and poor and industrious people. Capture by a pirate is illegal by all law; by an enemy, is often legal or not, according to circumstances. The vessel of an enemy has been cleared, because her crew saved the lives of the captors in distress. What stipulation protects property afloat or not, 4 Rob. R. 388. Ransom is now forbidden in England by 22 Geo. III. c. 25; 43 Geo. III. c. 160; 45 Geo. III. c. 72; except in cases of extreme necessity. As to exemptions by licenses, see Chitty's Law of Nations, 260 to 279; and many cases he cites from Rob. Reports: Also 8 D. & E. 550; 1 East, 475; 3 Bos. & P.; 9 East, 35, 44, a liberal construction of a license; and 12 East, 223, Rawlinson v. Janson, like construction; 12 East, 311, Barlow v. M'Intosh, shewing how soon &c. a license must be used; 1 East, 486, Vandyck v. Whitmore, a license on condition; 12 East, 302; 8 East, 273, case of Kensington v. Inglis; cited Ch. 40, a. 2, s. 15; 3 East, 332; Ch. 224, a. 9, several cases.

§ 68. *Rescue and recapture.* If a neutral rescue his ship captured, he forfeits his neutrality. See Ch. 40, a. 17, s. 11. Rescue is by the rising of the captured party against the captors. Friends and allies in the war are bound to rescue or recapture, if they can. But seamen captured, are not bound, as seamen, to rise on their captors; though such rising may be meritorious; each man must judge for himself. What is a rescue by rising or not, see cases in the margin. 1 Edw. 208, 232.

§ 69. *A capture within a neutral jurisdiction is illegal.* And according to modern law this includes all within cannon shot of the coast. And Marten says, if two belligerent vessels meet in a neutral port, and one sails, the other must remain 24 hours. s. 70. One cannot station herself at the mouth of a neutral river to search or make captures. 3 Rob. R. 336; 5 Rob. R. 373. Nor can a vessel lay within a neutral jurisdiction, and fire at an enemy without it, or send boats out &c. 3 Rob. R. 162, 134. A neutral territory is not to be used, said Sir William Scott, for any of the purposes of war, except perhaps those remote uses, "such as procuring provisions" &c.; nor can prisoners or booty be carried into a neutral territory, there to be detained without leave.

CH. 227.

Chitty's Law  
of Nations,  
86, 91.—1  
Rob. R. 19.—  
2 Mars. 422.  
—1 Rob. R.  
243.

Mars. 431,  
432.

Timson v.  
Meren.

1 Rob. R.  
271, 310.—  
Chitty's Law  
of Nations,  
190 to 196,  
and cases  
cited 3 Rob.  
R. 278.—4  
Rob. R. 408.  
—1 Acton,  
33.—5 Rob.  
R. 33.

Vattel, B. I. c.  
23, s. 289.—  
Marten, B. 8.

But see Ch.  
224, a. 9, s.  
20.



**CH. 227.** "Such an act is an immediate continuation of hostility." *Twee Gebroeder's case*. No more can a hostile act be commenced there. But this immunity is not imparted by neutral ships. s. 63.

§ 70. *A neutral's vessel &c. liable to capture and condemnation*: 1. Because he carries on a contraband trade; see *Contraband*, index: 2. Because he violates blockade; see *Blockade*, index: 3. Because he carries despatches for a belligerent; several rules and cases, *Chitty's Law of Nations*, 147 to 150; 6 Rob. R. 440, 461; 1 Edw. 41, 224, 228: 4. Because he carries troops &c. *Chitty's Law of Nations*, 150: 5. Because he trades with one belligerent power contrary to his nation's treaty with the other; 150: 6. Because his nation submits to the outrages of one belligerent; 150, 152: 7. Because the crew of a neutral ship rescued her from the hands of a lawful cruiser, after captured in war. 3 Rob. R. 278, *The Despatch*.

*Estrella's case*, 4 Wh. 296, 311.

§ 71. *Capture how illegal by arming in part in the United States*. The privateer *Constitution*, of Venezuela, was fitted out in, and duly commissioned by Venezuela, to capture Spanish property &c.; but increased her force in New Orleans, especially by there enlisting a part of her crew. She sailed, and captured the *Estrella*, a Spanish vessel, and soon after the privateer sunk. The *Estrella* was recaptured by the United States ketch, the *Surprise*, and conducted to New Orleans. Hernandez, the Spanish owner, libelled and alleged a piratical capture &c. The captors claimed. Held, 1. The loss of the privateer's commission, when she sunk, might be proved by parol testimony, also that she had a commission; (as to the seal, see *United States v. Palmer*;) 2. As the privateer increased her crew in the United States, in violation of their laws, this circumstance gave their courts cognizance of the case to make restoration to the Spanish owner; though the general principle is, that a capture can be tried and adjudged but in the courts of the captor's country; this violation of neutrality making an exception to the general rule: 3. The Spanish owner having proved the said enlistment at New Orleans, in violation of the act of Congress of June 5, 1794, c. 226, s. 2, it was incumbent on the captors to prove the persons so enlisted were citizens or subjects of Venezuela, within the provision of said section: 4. A neutral state may examine to ascertain if a captured vessel, voluntarily coming, or brought within its limits, has been taken in violation of its rights; or if "a trespass has been committed on its own neutrality, by the vessel which has made the cap-

Like case, 6 Wheat. 235, *La Conception*; and if the ship be transferred abroad, it must be clearly proved by the usual documentary evidence, and *bond fide* must the transfer be.—3 Dall. 155, 167; and when the capture is illegal, the neutral will restore &c., if within his jurisdiction.

ture : 5. If such neutrality has been violated, it is the court's CH. 227.  
 duty to restore the property captured to the original owner :  
 6. No part of said act of 1794, was repealed by the act of  
 March 3, 1817, c. 58 ; but was by the act of April 20, 1818,  
 c. 83, in which were embraced all the provisions respecting our  
 neutral relations : 7. If no act of Congress exist on the sub-  
 ject, our courts have power, under the general laws of nations,  
 to decree restitution of property captured in violation of our  
 neutrality, under a commission issued here, or an armament  
 made or increased here. See the *United States v. Palmer*,  
 Ch. 210, a. 7, s. 6, case of piracy ; and the case of the In-  
 vincible, 1 Wheat. 238, as to violation of neutrality.

Invincible.

§ 72. *Captures made in a civil war viewed as other cap- 4 Wheat. 497,  
 tures by a neutral recognising such war.* As where a cruiser 502, *Neustra  
 Senora de  
 la Caridad.*  
 was commissioned by one of the provinces of New Grenada,  
 against Spain, captured a Spanish vessel, as prize, and or-  
 dered her to Carthagena, in South America. This prize was  
 fallen in with by a United States armed vessel, and the cargo  
 taken out, and brought into the United States for adjudication,  
 as the property of their enemy. Was claimed by the original  
 Spanish owner,—also by the South American captor. Was  
 restored to him, there having been no violation of our neu-  
 trality. Rule being for the neuter, in such case, to leave things  
 as he finds them : 2. The case not within the Spanish treaty,  
 which provides for restitution only when a capture is made by  
 a pirate, or when the capture is made within the jurisdictional  
 limits of the United States. This case was neither. The  
 United States vessel seized this cargo as British property. See  
 the evidence. The United States have recognised this civil  
 war. 4 Wheat. Appen. 23 to 59.

§ 73. *What a capture and not a seizure in port.* As 10 Johns. R.  
 where a policy was on goods from Philadelphia to St. Sebas- 278, *Duval  
 v. The Com.  
 Ins. Comp.*  
 tian's ; and the vessel, when two leagues from land, was  
 boarded by a launch from the shore, with forty or fifty men  
 on board, armed with two swivels, and a number of muskets.  
 After having fired two guns, and ordered the master to bring  
 to his vessel, they took possession of her, and put a prize-  
 master on board, and sent her to Port Passage, where she was  
 compelled to perform quarantine eight days, after which the  
 agent and French consul went on board, and sealed her  
 hatches. The master and supercargo were sent to St. Se-  
 bastian's ; and sometime after, a pilot and French crew were  
 put on board the vessel, and she was sent to Bayonne. The  
 cargo was placed under sequestration, and remained on board  
 the vessel about two months, and then landed by order of the  
 French government, and placed in the public stores. Held,  
 to be a total loss by capture, and not by seizure in port.

CH. 227.

3 Dall. 154,  
160, Talbot  
v. Jansen.

§ 74. Some acts committed on the high seas may be unlawful, yet not piracies: 2. However, of such a nature as to induce a neutral court to restore when the vessel captured is brought within its jurisdiction: 3. If a legal cruiser make a capture by the instrumentality of a neutral, having no right to cruise, it is unlawful, and if so brought in, will be so restored: 4. Only legal vessels of war, owned by the parties at war, are exempted from the examination of a neutral court, as to their prizes: 5. And if a vessel claim such exemption, the neutral court may, if applied to, inquire into her true character: and 6. If not a legally commissioned cruiser, she may be considered as having no commission, or a mere colourable one,—is none, in the contemplation of national law. See what is an innocent arming in a neutral country. 3 Dallas, 307, 319. If the capture be made within the limits of a neutral country, or by a vessel fitted out in it illegally, its courts are bound to restore to the owner his property so illegally captured: 2. A neutral nation may, if it please, allow both belligerents to fit out their vessels of war in its ports, and this is no breach of neutrality.

9 Cranch,  
360, The  
Alerta.

5 Wheat. 338,  
368, The  
Josef Se-  
gunda.—6  
Wheat. 152,  
176. The  
Bello Cor-  
runes.

§ 75. On a piratical capture, the original owner's property is not forfeited by the captor's misconduct, in violating the municipal laws of the country into which the seized vessel is brought: 2. Where a capture is lawfully made, the captor acquires a title, to be divested only by recapture, or by a legal sentence of his own country; and the property is forfeited if the captor violate those laws, and of a neutral country. The capturing vessel was a commissioned Venezuelan privateer. The vessel captured was a Spanish ship, with slaves. Capture was regular. Forfeited by violating our slave act, enacted March 3, 1807. See s. 9, what is a piratical capture.

La Amistad  
de Rues, 5  
Wheat. 385,  
398; captors,  
claimants  
had not  
violated &c.

§ 76. A Venezuelan privateer captured the Spanish ship La Amistad de Rues, and she was brought into the United States by a detachment of their force, and restored to the claimants. Held, 1. In cases of marine torts, the probable profits of a voyage are not the rule of damages: 2. If a belligerent violate our neutrality, and the prize voluntarily comes into our ports, our courts only have power to restore the specific property to the original owners, with costs and expenses, *pendente lite*, and if they leave facts doubtful, the court will not interfere.

§ 77. *Where a condemnation must be.* It is well settled, that the court which condemns must be held in the dominions of the captor's sovereign, or in those of his ally in the war. Therefore it cannot be held in a neutral country. 3 Rob. R. 96; Am. ed. 82, 86. And is not aided by a sentence of a

1 Rob. R.  
114, Am. ed.

court of prize in the enemy's country, decreeing restitution to the neutral claimant, on the circumstances of an after capture; nor is the captor's prize held in a neutral country, aided by its consent. *Id.* See the case of the *Flad Oyen*. CH. 227.

But a condemnation of a prize may be legally made in the captor's country, though the prize is in the country of an ally. As in the war of 1793, between England and France, and Spain, her ally, a British ship captured and carried into Spain by a French privateer, was condemned by a court sitting in France; and held legal, though at the time of the condemnation the prize remained in the Spanish port. The *Christophier's* case, 2 Rob. R. 209; Am. ed. 173, 185. So by modern practice such condemnation had been good, though the prize had been carried into, and remained in a neutral port. 4 Cranch, 293, *Hudson & al. v. Guestier*, (fully stated in another place.) And Sir William Scott thinks Great Britain is bound by this practice, though he holds principle is otherwise.

§ 78. *Recapture of the property of allies.* On this subject the English law is that of reciprocity. It adopts the rule of the claimant's country, where that rule is known, or where it can be ascertained. Where it cannot be, then the English rule is applied. Held, where a Portuguese vessel was recaptured by an English vessel, thought best to apply the rule of the recaptor's country, when that of the claimant's nation is not known. 1 Rob. R. 42 to 67, Am. ed. The *Santa Cruz*; 1 Rob. R. 78, 85, Am. ed. The *Betsey*. April, 1794, the English captured American neutral property. In June, 1794, the French recaptured it. Held, the Americans must look to the French, as their recapture entirely destroyed all the effects of the English capture.

§ 79. *Contrabands of war.* See Ch. 40, a. 6, s. 8, 9, 10, 1 Rob. R. 23, 11. Masts are such. And contraband articles affect the innocent parts of the cargo, as far as both belong to the same person; but not other innocent articles, the property of a different owner. 26, Am. ed.

Provisions are sometimes contraband, and liable to capture, and sometimes not; and the distinctions are numerous in detail; the principles are not a few. One principle of distinction is founded in the place where produced. One,—provisions are not always contraband when “of the growth of the country that exports them,” as the native exports of a country, by the citizens thereof, are more indulged. Another ground of indulgence is, when the “articles are in their native and unmanufactured state;” as iron is not contraband, “though anchors and other instruments fabricated out of it,” are. Hemp is more favoured than cordage; and wheat than bread. 1 Rob. R. 159, 166, Am. ed.

**CH. 227.** Another principle of distinction is, "whether the articles were intended for the ordinary use of life, or even for mercantile ship's use; or whether they were going with a highly probable destination to military use. Hence much depends on the state of the port to which the provisions &c. are carried; if a general commercial one, it will be understood the articles go for civil use; though occasionally a vessel of war may be constructed there. Otherwise, if a port whose great predominant character is of a naval military equipment. In this case it will be intended the articles are going for military use, though merchant ships resort there, and it may be possible the articles come to a civil use. On these principles, Bourdeaux is not, and Brest is a military port. Hence cheeses going to Brest, if such as the French ships of war use, are contraband, and were condemned, but not the ship, though both belonged to the same owner, because he had acted fairly, and rather from mistake &c.

1 Rob. R.  
277, Am. ed.

Generally contrabands owned by A affect his ship, or his part of it, and all his property in the same bottom. As where tar was going from Bremen to Rochelle, owned by S. condemned as contraband; also his part of the ship was condemned; the tar more especially, because taken going from a port of the country of which it could not be the produce. But contraband cargo does not work a forfeiture of the ship, where owned by a different fair proprietor.

Rob. R.  
99, Am. ed.

Contrabands redeemed instead of being confiscated. This is a modern relaxation of the old rule.

2 Rob. R.  
115, Am. ed.  
—3 Do. 102.

A ship on her return is not liable to confiscation for having carried a cargo of contrabands on her outward voyage. Tallow is not a contraband. 3 Rob. R. 91, Am. ed. Hemp fitted for naval purposes is contraband; *secus*, not fit. 4 Rob. R. 77. But hemp to an enemy's port, the produce of Russia, (neutral) owned by a Russian merchant, not contraband, though in a Danish or Prussian &c. ship. 129. So pitch and tar owned by a Swede, produced in Sweden, captured on a voyage from Sweden (neutral) to a Dutch port in a Swedish ship, not contraband. 135. Otherwise where pitch and tar are not the produce of the exporting country. 200.

August, 1800.

3 Rob. R.  
178, 183,  
Am. ed. •

It is now the settled rule in England, (A. D. 1801,) that the carriage of contraband with a false destination, will work a condemnation of the ship as well as of the cargo. Was a Prussian ship going from Lubeck ostensibly to Lisbon, but in fact to Bilbao. It seems the cargo was owned by Hamburg merchants privy to the false destination. Generally the carriage of contraband works a forfeiture of freight and expenses, but not of the ship.

5 Rob. R.  
239, 242,  
Am. ed.

§ 80. *Acts of the captors that forfeit their rights &c.* The actual wrongdoers only are the persons liable in the admiralty, where acts of limitations are not applied. When the captors improperly carried a prize to Lisbon and detained it there, they were ordered to pay damages and costs, deducting the expenses that would have arisen in conducting the prize to England &c. CH. 227.  
1 Rob. R. 151,  
Am. ed. 152.  
—4 Rob. R.  
153, 160, Am.  
ed., The Pea-  
cock.

Demurrage is given against them for unnecessary delay in proceeding to trial. 1 Rob. R. 241, Am. ed. And they may be compelled to proceed to adjudication. 3 Do. 192, The Huldah. If they embezzle, must restore in value. 2 Rob. 85.

But under a commission of unlivery the captors are not answerable for forcible robberies of goods, properly deposited in warehouses; and if a neutral ship in their possession be lost by storms &c. they are not liable. The Carolina. If they conduct with fair intention they are not answerable for more than the proceeds of the sales on an order of restoration. 4 Rob. 348,  
The Maria.—  
2 Rob. R.  
210, Am. ed.

§ 81. *Frauds in cases of capture.* Many rights in these cases are lost by concealments &c., amounting to legal fraud. Therefore, if a neutral and an enemy own a ship, and the neutral claim the whole when captured, the whole is liable to condemnation, because his claim of the whole is a fraudulent concealment of the enemy's part. It is generally true when the vessel's papers state facts truly, and then no suspicion of fraud arises, her owners are liberally treated in courts of admiralty in cases of capture, detention, or seizure, and often restored, though by the strict rules of law liable to condemnation. See 1 Rob. R. 286, Am. ed., 332 London ed. 2 Rob. R.  
251, The  
Susa.

§ 82. *Blockade.* See Insurance and General Index. In the blockade of Amsterdam, Nov. 1798, Sir William Scott held, "that if a vessel sail for a blockaded port, after having received notification of the blockade, the act of sailing is to be considered as a breach of the blockade;"—also held, that it to be the duty of a country notifying a blockade to notify the revocation also. *Quare*, if such sailing be viewed in the United States as a breach of blockade. In the case of the Neptunus, 1 Rob. 110, this distinction was taken, to wit:—in the case of a blockade *de facto* only, such sailing may not be a breach, but when by notification, the act of sailing to the blockaded place is sufficient to constitute the offence. "It is to be presumed that the notification will be formally revoked, and that due notice will be given of it; till that is done, the port is to be considered as closed up." 2 Rob. R.  
109; 91, Am  
ed., Vrow  
Joanna.

Held in this case, that if a ship which has broken a blockade is captured in any part of the same voyage, she is taken in *delicto*, and is a subject of condemnation. 2 Rob. R.  
107, Am. ed.

## CH. 227.

4 Rob. 77,  
77, Am. ed.,  
The Alexander.

A blockade is directed more against the cargo than the vessel; hence the court infers, that her going into the port fraudulently, is going in the service of the cargo, with the knowledge and by the direction of the owner. This inference leads to the condemnation of the cargo. Was a voyage from Lisbon, ostensibly to Altona, but actually going into Havre, then blockaded, under a pretence of wanting provisions. Vessel and cargo condemned, though owned by different persons, and though urged by the claimants of the cargo that they were not bound by the acts of the master; and the court said, that if they suffer any inconvenience they must look to him. But to hold this sailing in itself to be a breach of blockade, it must clearly appear the master had knowledge of the notification of the blockade.

3 Rob. R.  
122, 131, Am.  
ed.; 138, The  
Imina.

If the vessel sail for a blockaded port, and the master on learning the fact alter her destination and sail for another port, the question of contraband does not arise.

3 Rob. R.  
229, The case  
of the Adelaide.

*Time of notice of blockade from Amsterdam to the United States.* The calculation seems to have been as much as nine months for notice to go from Amsterdam or England to the United States, and counter orders to return from them to Amsterdam; not only distance was taken into view, but also the accidents by which the general intercourse is liable to be retarded.

3 Rob. R.  
143, The  
Neptunus.

§ 83. *Acts of agents residing in blockaded ports.* The principal are not so responsible for them as in common cases. "Two or three considerations weigh much to induce me (said the Judge) to limit the extent and application of the principle to the particular cases." In the first place, the law of blockade is not very common in mercantile experience, is new to merchants, and not very familiar to lawyers themselves; second consideration is, that the agents of foreign merchants in the enemy's country under blockade do not stand in the same situation as other agents. "They have not only a distinct, but even an opposite interest from that of their principal, to fulfil the commission at all risks as rapidly as possible, for their own private advantage, and for the public interest of their country, at that time under the particular pressure as to the exportation of its produce." Though this general reasoning of the judge is good, there must be excepted cases.

1 Rob. R.  
287, The  
Maria, A. D.  
1798.

§ 84. *Resisting the search of neutrals.* See Insurance, Ch. 40, a. 17. It has been decided, that if a vessel (neutral) sail under convoy with intentions to resist a search, this is a neutral resistance of search. The conveying ship was a ship of war, a Swedish frigate, and the vessel captured conveyed by her was a Swedish merchantman, both neutral. Like case in principle, 4 Rob. R. 333, 345, Am. ed., the Elsabe. It may

be observed, that the case of *Saloucci & Johnson* stands quite alone. CH. 227.

§ 85. *Freight in cases of capture.* When the ship is captured it is a general rule for the captors to allow the master his whole freight &c.; the captors take the place of the freighters; they acquire no rights against the neutral master who conducts fairly; but freight is not allowed him on contraband articles. Several cases.

1 Rob. R.  
204, 208, Am.  
ed.

The general maxim is, that capture is delivery, is true only where the captors succeed fully to the rights of the enemy, and represent him as to those rights. If a neutral vessel having enemy's goods is taken, the captor pays the whole freight, as he represents the enemy by taking his goods *jure belli*; and though the whole freight be not earned by completing the voyage, yet as the captor by his seizure has prevented its completion, his seizure operates as a delivery of the goods to the consignee, and subjects the captor to the payment of full freight in case of no restoration; if restored, the ship proceeds and earns her freight and receives it according to contract, and in such case she may earn her freight *pro rata itineris*.

1 Rob. R.  
242, 243, The  
Copenhagen.

Freight refused to a neutral ship carrying salt from one Spanish port to another; the coasting trade in war not open to neutrals in peace.

1 Rob. R.  
249, Am. ed.

Freight refused to a ship in the colonial trade bound from Mauritius, ostensibly to Hamburg, but captured going to a French port in time of war.

3 Rob. 36,  
The America;  
p. 149,  
The Hiram.

Freight *pro rata* on a capture and recapture refused to a vessel brought to her port of departure, or one near to it; forfeited, 4 Rob. 164, Am. ed., the goods being contraband; The master's ignorance not allowed; see also p. 195. Captors may have freight when they carry the goods to the destined place. p. 228. If the ship by lost by the prize master's negligence, freight is not limited to the proceeds of the goods saved. p. 256.

§ 86. *Several cases of joint-captures.* The ship which claims to be a joint-captor must either co-operate in fact, or be so situated as to encourage the capturing ship, or to intimidate the captured. 2 Rob. R. 13, 226, 240; 3 Rob. R. 9, 14, 48, 169, Am. ed.

§ 87. *Postliminy*, says Vattel, "is that, in virtue of which persons and things taken by the enemy are restored to their former state when coming again under the power of the nation to which they belonged." Vattel B. 3, c. 14, s. 204. The right of *postliminy* "is of no force among neutral nations;" such must deem the war just both sides; hence view all taken as a lawful acquisition. s. 208. By this right goods are recoverable as far as certainly known; but the uncertainty



CH. 237.



in knowing them, has induced a rule that excepts them from the laws of *postliminy* generally, and unless retaken immediately after taken. But Roman slaves were always the subjects of *postliminy*, ever being known. s. 209. Prisoners of war, towns, and territories, which have submitted to the enemy and promised allegiance to him, cannot of themselves return to their former condition by this right, as faith is to be kept even with enemies; but if retaken by their former sovereign, he recovers all his former rights over them, and he is bound to place them in their former condition. Those prisoners of war who give their parole are only bound not to run away, but may well be retaken by their country. s. 211. Goods aliened by the capturing enemy are not the subjects of this right, but things immoveable, as lands &c. are, and if he alien them before confirmed to him by treaty, the buyer must lose them; or the capture of lands may be confirmed by the submission of the whole state. Taking a prisoner gives no right over his property not seized with him. A town ceded by treaty of peace, or completely in the captor's power by the submission of the whole state, is no longer entitled to the right of *postliminy*; and he may alien it irreversibly, and so if fortunately recovered. Id.; 2 Wooddes. p. 441, sect. 34. This right of *postliminy* does not exist after the conclusion of peace, not as to things ceded or restored, or about which the treaty is silent, these last being left to the conqueror. Vattel B. 3, ch. 14, s. 216. Legally to alienate moveables the captor must have complete possession, some think twenty-four hours' possession is it; some, the property must have been *infra præidia*; the line is unsettled. Sir William Scott thinks that by the general practice of nations a sentence of condemnation is deemed generally necessary. 1 Rob. R. 134, case of the *Fiad Oyen*. This is the settled rule in England. See s. 42; 3 Rob. R. 236; see also, *Goss v. Withers*, and *Assievedo v. Cambridge*. And the condemnation must be in a competent court in the country of the enemy or of his ally, and not in a neutral country. But a peace concluded confirms the captor's transfer to a neutral, even though no condemnation. 6 Rob. R. 142; Marten's Law of Nations, 291; Wheaton on Captures, 241.

§ 88. *Commentaries*. On a full view of the law of nature and nations, unaffected by any treaties, the following rules may be laid down as to captures in war, especially of neutral property. 1st. Every independent nation has the sole and exclusive jurisdiction within its own territories, ports, harbours, bays, rivers, and straits, and within cannon shot of its shores.

2d. Whenever a nation remains neutral in a war, no belli-

gerent can violate this neutral jurisdiction, by committing any act of hostility within it, not even against an enemy flying into it from fighting, commenced on the high seas. CH. 227.

3d. But a belligerent, by effectually blockading, besieging, or investing a place of his enemy, acquires the jurisdiction round it, as far as he continues exclusively master of the land or water; and an effectual blockade &c. of a place, is where the blockading vessels so keep their stations, that it is imminently dangerous for any ship or vessel to enter into it, or to sail from it.

4th. It is in virtue of this acquired jurisdiction, the belligerent blockading &c. has a right to forbid the neutral to enter the place, on pain of confiscation of the property attempted to be pushed into it, after notice from him of the state thereof.

5th. But as the belligerent right so to seize, capture, and confiscate neutral property, is solely in virtue of this his acquired jurisdiction, (from his enemy,) he has no right to seize or capture beyond the jurisdiction so acquired. Hence not on the high seas, as there he cannot acquire it, unless the neutral forfeit his said property, by attempting to push into such place after such notice and warning off; then as the property is forfeited by the neutral to the belligerent so blockading &c., he may follow it, and seize it on the high seas.

6th. If the law of nature and nations, unaffected by treaties, recognize at all contrabands of war, it forbids to be carried by a neutral to a belligerent only arms and instruments of war, actually fitted and prepared to be used in war, not rough materials, that may by skill and labour be fitted and prepared for such use.

7th. When a nation, in a time of peace, has certain commerce with other nations, and remains neutral after they engage in war, it may honestly and impartially continue such commerce in the war, except as to such places blockaded &c. and such contrabands of war. Such places, because the jurisdiction about them is changed as above stated; and this natural and national law will not allow a neutral, even by treaty made in peace, directly to aid in arming one belligerent against the other; for to do this, is evidently to take a part in the war, and the belligerent so armed against, not being a party to such treaty, is in no degree bound by it. It is absurd to say the neutral preserves impartial neutrality, when he actively sends such arms to one belligerent, and not to the other; but if he send such arms to both, and they receive them, then neither can complain.

8th. The right to capture property in war, rests on ownership generally; hence a belligerent may capture his enemy's

**CH. 227.** property, found in a neutral vessel on the high seas, and without territorial jurisdiction, paying the neutral master his freight, damages, and costs. The right of search is of course when properly exercised.

9th. On the same principle the belligerent cannot confiscate neutral property found in an enemy's vessel ; and the ownership of the property is a better ground to act on, than the influence of the flag ; and it is not only more honest, but more for the interest of a wealthy nation, to make, by fair purchase, enemy's property truly neutral, than to carry it for freight &c. as enemy's ; but it cannot be made thus neutral while in *transitu* on the high seas, in a time of war.

10th. The neutral may act passively, and within his own territories sell even such arms and instruments of war to one belligerent, fairly and *bonâ fide*, if ready to do the same to the other. This law only forbids the neutral to take an active part in transporting them to him. Further, when the neutral sells them, he has no right to know what the purchaser means to do with them ; he sells them to pass into the market generally. But it is conceived, that when the neutral sells them, directly intending they shall go to arm one particular belligerent against the other ; as this is designedly to act on one side in the war, he becomes, in a degree, an ally in it, and subjects his property to capture.

11th. A neutral nation may manufacture and sell arms to both belligerents, and of course provisions and other productions, for when both buy, neither can complain ; and so permit its neutral citizens, or subjects, as they may see fit, to serve both in arms or otherwise ; so to permit both to enlist soldiers in its territories, especially if bound so to do by treaties made before the war ; perhaps so to permit one belligerent alone, if bound so to do by treaties made before the war, and with no special reference to it, but in reference to all nations, or to any war ; for no nation ought to refuse to execute a treaty or convention fairly made, because some other nations see fit to engage in war. But the effect of the execution may be in some cases to make the neutral an ally, and then his property may of course be captured.

12th. Whether a neutral, by his acts and intentions, is made an ally in the war or not, is a question usually which must depend on the circumstances of each case. Some cases, however, are clear,—as if our nation, in a time of peace, foresees a war inevitable, between two certain nations, and with a direct intention to assist one of them in it against the other, makes a treaty accordingly, and executes it to such purpose, in the war, such nation, otherwise neutral, becomes an ally with the favoured belligerent, and gives the other a right to capture,

of course, the property of such pretended neutral. For in these, as in private affairs, it is the intention, made manifest, that is to be most regarded. An enemy's vessel ostensibly transferred and continued in his trade, is liable to capture; but the evidence and circumstances must prove the transfer was a mere cover, not *bonâ fide*. But whether transferred or not, the course of traffic and employment may decide the right of capture, (1 Rob. R. 1, 13, 15, 16,) independent of the owner's domicil; and if for want of a sea-port in his own neutral country, he continues his vessel in the enemy's trade, she is liable to be captured. p. 17.

CH. 228.

Art. 1.

## CHAPTER CCXXVIII.

## OUR WRIT OF RIGHT, AND PLEADINGS &amp;c. THEREIN BRIEFLY EXAMINED.

ART. 1. *The nature of this writ &c.* It is the highest writ in the law, and being so of course when there is a decision in it, the demandant can have no other writ. 3 Wils. 419; 5 East, 272. It lies only for a fee simple estate,—only against the tenant of the freehold or inheritance in fee demanded,—only on the actual seizin of right of the demandant, or of his ancestor once had, within the time prescribed by the acts of limitation, and seizin in his demesne as of fee, by taking *esplees*. (What proves such seizin, see Ch. 104, a. 3, s. 34;) 2 Bos. & P. 270. It lies concurrently with all other writs when a fee simple estate may be recovered, and it lies after them. Co. Lit. 281, 293. It lies for an infant disseizor against his alienee; “for as to such parties the disseizor has the greater right.” It also lies, where the demandant is barred from his possessory action. 3 Com. D. 544. Lies not for a purchaser or devisee, but on his own seizin. 2 Saund. 45. Lies solely on the right of property, and has no regard to the right of possession; 2 Saunders, 450, Williams’ Notes; and the *mise* is joined on the mere right; 2 Saund. 45 e, Williams’ Notes; and in England is triable only by the grand assize; Id. as to which the tenant begins to give evidence, 45 f; and the jury cannot find a special verdict on the *mise* joined. Id. And nothing in the action can be pleaded but a collateral warranty, and every thing else may be given in evidence upon the *mise*

F. N. B. 1, 2,  
3.—3 Bl.  
Com. App. 2,  
& 3.—3 Bl.  
Com. 193,  
196.—8  
Craich, 229.  
—1 Ch. on  
Pl. 115.—1  
H. Bl. 1.—3  
Bl. Com. 191,  
194.—Co. L.  
278.—5 East,  
289.—3 Bl.  
Com. 191.—  
Booth, 96—  
Bro. Droit,  
48.—Booth,  
98, 112.—  
3 Wilson,  
420.

CA. 228. joined. Id. But see Booth and post. And as the demandant must allege and prove actual seizin, it seems to follow he has this writ only for property of which he can be actually seized.

Art. 3.

ART. 2. *The demandant's declaration.*

5 East, 272,  
Dowland v.  
Slade & ux.  
in error.—  
Same case, 2  
Bos. & P.  
570, 577.  
The case H.  
Bl. 1, as re-  
ported, does  
not state the  
plt's seizin  
was of right.  
—F. N. B. 1.

He must in this writ of right allege in his count, that his ancestor was seized of right, as well as that he was seized in his demesne of fee, for so are all the English precedents. 5 East, 289. And though 478th section of Littleton shews, that an infant disseisor may recover in a writ of right against his alienee, yet it does not shew the form of the count must not be as above, stating seizin of right, whatever may be required as to the proof: 2. So the demandant must allege in his count accurately and truly, how he is heir of his ancestor so seized; this point is clear: 3. On the ground above stated, if the demandant sue on his own seizin, he must allege in his count that he was seized of right. See a good form of a count in a writ of right, in Currier & al. v. Parsons, post; also in Tissen v. Clark, 3 Wils. 419, 541.

ART. 3. *The plea, issue, and evidence.*

2 Saund.  
45 e; cites in  
Bro. Droit,  
48.—Booth,  
98, 112.—3  
Wils. 420.—  
1 H. Bl. 1,  
Dally v. King.  
—Booth on  
Real Actions,  
118, 115.

§ 1. *Plea.* It is said as above, that nothing can be pleaded in this action but a collateral warranty, and that all besides is in evidence, and this seems to be the general doctrine; yet it is in some books said, that the tenant may plead specially several matters, as a fine levied, a former judgment in a writ of right, a devise by the demandant's ancestor, &c. And Booth on Real Actions, says, in pleading in a writ of right, "if the matter in bar to the assize be clear, then it is sometimes most for the advantage of the tenant to plead it, and not put himself on the grand assize, which is very dilatory." p. 115. And the same author says, (p. 114,) a "collateral warranty is to be pleaded in bar, and not to be given in evidence on the *mise* joined; and the reason I conceive to be, because the warranty does not prove any right, that is *mitter le droit* out of the feoffor, and put it into the feoffee, but only bars him of his right by force of the covenant real, so that if the *mise* should be joined upon the mere right, the warranty would not help, because the grand assize must give their verdict upon the mere right, which remains still in the party, notwithstanding the warranty; but if he plead the warranty in bar, then the demandant is estopped by his warranty." Cites Lit. sect. 478. This reasoning and manner of pleading will hold whenever the demandant is estopped, barred, or rebutted, merely by his warranty.

§ 2. Booth, 155, adds, "in regard all special matters may be given in evidence in a writ of right upon the *mise* joined, therefore, that is the safest way so to plead."

§ 3. 8 Cranch, 244. On the fourth point made, the court

held, that "under the act of Virginia of 1806," ch. 27, "reforming the proceedings in a writ of right," "the tenant may at his election plead any special matter in bar in a writ of right, or give it in evidence on the *mise* joined; the act is not deemed compulsive but cumulative." And see 3 Wils. 420, a second plea. *Green v. Lister*, 8 Cranch, 229, 251; see Ch. 104, a. 3, s. 34.

CH. 228,  
Art. 3.

§ 4. *The issue.* It seems on the grounds just stated there may be a common issue joined in a writ of right, whenever the tenant elects to plead any special matter in bar, as collateral warranty, a former judgment, &c.; and the issue will grow out of the pleadings as in other cases; and must in his special pleas, plead according to the rules of law; hence, he cannot plead a plea amounting to the general issue &c. But the *mise* joined in the usual issue in this action, which is thus, and the said D (tenant,) comes and defends the right of the said Tissen, (demandant,) and his seizin, when &c., and the whole &c., and whatever &c., and he prays a recognition to be made whether the said D, (tenant,) has a greater title to hold the tenements aforesaid with the appurtenances to him and his heirs as tenants thereof, as he now holds the same, or whether the said Tissen, (demandant,) has title to hold the same tenements with the appurtenances, as he has above demanded the same &c.; and the said Tissen (demandant,) doth the like. And the tenant by leave of the court also pleaded in bar a fine with proclamation levied, 16 Geo. II. &c. and non-claim. But the court thought this matter might be in evidence on the *mise* joined. The objection to this second plea was, that an issue on it must be tried by a common jury of twelve, whereas the *mise* joined in the same action could be tried only by the grand assize, consisting of four knights &c., and twelve other jurors, in all sixteen jurors or recognitors. This objection does not lie in our practice, as we try the *mise* joined by a common jury of twelve men.

3 Wils. 419,  
*Tissen v.*  
Clark.

§ 5. The tenant may also pray in aid in the form stated. 2 Saund. 45 d, &c.; and if tenant for life only, and he do not, strictly he forfeits his estate. Id. And he ought to pray in aid him in reversion or remainder, in tail or in fee, to defend the inheritance. Must be before a general imparlance. See also the form, Ch. 177, a. 3, s. 5, in a note.

And 2 Bos. &  
P. 384, On-  
slow v. Smith.

§ 6. *Demandant's evidence.* It seems to be settled, as before stated, that he must allege in his count actual seizin of right; but must he prove actual seizin of right. It seems clear, he must prove actual seizin. This point is well settled in 8 Cranch, 244, where the court say, "it is clear by the whole amount of authority, that actual seizin or seizin in deed, is at common law necessary to maintain a writ of right."

1 H. Bl. 5.  
Demandant  
must shew  
actual seizin.  
*Green v. Lis-*  
*ter.*

CH. 228.

Art. 3.

8 Cranch,  
246; cites  
Hargrave's  
notes, 3  
Co. Litt. 24 a.  
Litt. s. 417,  
418, 419.—  
Com. D.  
Uses B. 1.  
—1 Cro. El.  
46.—1 Cruise  
D. 12, &c.

and that the said act of Virginia has not altered the law in this respect, though it has given the form of a count, omitting any allegation of seizin and taking *esplees*, for the act also gives the form of joining the *mise*; and this form preserves the inquiry, "which has the greater right," as the form at common law. The act also allows "any special matter to be given in evidence on the *mise* joined; and seizin on the *mise* joined has ever been essential." And the Virginia act of limitations, December 19, 1792, ch. 77, (old act revised) on this point limits a writ of right upon ancestral seizin to fifty years, and on the demandant's own seizin to thirty years, next before the teste of the writ. Hence, he must prove such seizin or fail; but he need not prove taking *esplees*, they are the consequence of seizin; and in some cases there cannot be any, (1 H. Bl. 1, 5, the court said, "the demandant must shew an actual seizin either in himself or his ancestor, by taking the *esplees*,") nor actual entry under title; even at common law, a constructive seizin in deed is sufficient in some cases. And see Seizin, Ch. 104, a. 3; and Ch. 132, estates by entry and possession. "And the Kentucky act respecting conveyances, which is in substance like the statute of uses,—gives to private deeds the same legal effect." A patent under the land law of Virginia of 1779, ch. 13, gives the patentee actual seizin of the land &c. Cites 5 Co. 94, stating, "that letters patent under the great seal do amount to a livery in law." This is a delivery of seizin where there is no interfering possession. Further, such a patent under the act of Virginia must be considered as a statute grant, and the legislature meant it should give a complete title to wilderness lands without actual entry, which was often impracticable. It is believed that this has been the construction of legislative, State, and Federal grants of lands generally. See the reasons at large given by Judge Story in delivering the opinion of the court in *Green v. Liter*, 8 Cranch, p. 244. In Kentucky a patent is the completion of the legal title.

8 Cranch,  
249.

Q 7. *Must the demandant prove his seizin to be of right?* In *Green v. Liter*, the court held, that "it is the legal title only that can come in controversy in a writ of right;" "the previous stages of title are merely equitable, which a court of chancery may enforce, but a court of common law will not entertain. In this opinion we adopt the principles which the courts of Kentucky have been understood uniformly to sanction." Seizin of right must mean rightful seizin, not by disseizin, if it means any thing. Yet there is one case at least which shews a seizin by disseizin will support a writ of right; that is the case of the infant above stated from Litt. sect. 478; and 5 East, 289; in which it is said the "seizin,

though acquired by wrong, will establish a right against one who can only claim under the demandant, whose alienation on account of his non-age will not be binding." This case of the infant is that of a disseizor who has not aliened at all. This case does not prove that a demandant, whose title commences by disseizin, can recover against a tenant not claiming under him. This writ has no regard to the right of possession. 2 Saund. 45 e. Yet the *mise joined* raises directly the question, which party has "the greater right."

CH. 228.  
Art. 3.

As the writ of right does not regard the right of possession, but only the mere right of property; it seems to follow that no title the demandant has, beginning in disseizin, can support this writ, till that title has become legal by length of time and quiet possession, for 60, 50, or 40 years, as the statutes of limitation may be.

§ 8. Can the tenant defend by giving in evidence a better subsisting adverse title in a third person, in a writ of right on the *mise joined*. 8 of Cranch, 250, it is decided he cannot; for this "writ brings into controversy only the mere rights of the parties to the suit." No reason is reported as given by the court or counsel of the demandant.

Green v. Lister.—See a. 4, s. 3, 15.—See Ch. 104, a. 3, s. 34.

In this writ of right, *Tyssen v. Clark*, the material question was, if the demandant's grandfather, in 1706, made a grant *in fee* to Thomas Flanders, of the premises, or a lease for forty-one years. Gould J. held, the tenant's evidence proved such a grant. But the other judges held it only amounted to a presumption thereof, and so to rebut it let in loose evidence, as will be stated in a future page. On a fair view of this case, it appears that had the other judges held as Gould J. did, that the tenant's evidence proved such a grant of the fee to Flanders, a third person, under whom he did not claim, then the tenant must have prevailed. And his counsel urged that his evidence proved the grant, and that this, and possession under it, proved that the demandant's ancestor had not been seized within sixty years. Perhaps the material question in this case was, should any evidence have been admitted to prove a title, of any sort, adverse to the demandant's? But such was admitted, though not sufficient to prove the grant; had it been sufficient to prove it, it had proved a complete adverse title. Thus the court did admit the tenant to prove, if he could, that the demandant's grandfather did make a grant *in fee* to Flanders, a stranger; and if the tenant's evidence had been sufficient to prove such grant, it would have fully proved the demandant's grandfather not only passed the seizin, but also the mere right of property from himself to this stranger, and thus a title in him would have defeated the demandant's action; and in fact the main title tried was between him and Flanders. But it

3 Wils. 419, 541, 564, *Tyssen v. Clark*, A. D. 1773.—Ch. 94, a. 3, s. 6.—Ch. 132, a. 7, s. 11.—See *Camp v. Lockwood*, Ch. 221, a. 16, s. 1.



CH. 228.

Art. 3.



3 Wils. 563 —  
Judgment is  
final if the  
plt. be de-  
faulted after  
the mise join-  
ed, 1 Com.  
D. C. 6,  
Droit.

must be admitted, there have been several decisions to the contrary, some of which are stated in this work. On the other hand, if the demandant in fact has no title, why should he be allowed to deprive the tenant of his possession, and even right of possession; as stated in several cases in a future article.

§ 9. *Form of the judgment for the demandant.* This is thus. It is considered that the said A. B. recover his seizin against the said C. D. of the tenements aforesaid, with the appurtenances, to hold to him and his heirs quit of the said C. D. and his heirs forever; and the said C. D. in mercy &c. For the tenant, Co. L. 295. So if he confess the action, or is non-suit.

§ 10. *The view in a writ of right.* See View in our practice, Ch. 68, a. 4, s. 4; Ch. 178, a. 13, s. 12; Ch. 179, a. 16, s. 12. In England, see Willes, 345, *Davis v. Lees*.

See the ten points decided in a writ of right, Ch. 104, a. 3, s. 34. See also points decided in a writ of right, Ch. 178, a. 15, a. 21; Ch. 99, in sundry cases.

8 Bl. Com.  
193, 197.—  
Fitz. N. B.  
1 to 12.—  
Brac. book  
5, ch. 2.—  
Finch, L.  
313.—3 Bl.  
Com. Appen.  
—Booth, 91,  
92.—3 Com.  
D. Droit. B.  
1. B. 2. B. 3.

§ 11. When the right of possession is lost by length of time, or by judgment against the true owner in land actions of inferior grades, there remains no remedy but this writ of right;—in England, *patent*, or directed *open* to the lord of the manor, or in his absence to his bailiff, or *close*, directed sealed to particular persons. And this writ of right is of so forcible a nature, that it overcomes all obstacles, and judgment in it is absolutely final; and the true ground of it is the tenant's unjustly withholding from the true owner his lands he is justly entitled to in fee. Usually the writ of right is first brought in England in the court baron of the lord, and then is patent; and if he hold none, then it is brought in the king's courts by writ or *præcipe* originally, and then it is a writ of right *close*, being directed to the sheriff, and returnable into said court. As our writs of right are all served by the same officers, all issuing from, and returnable to the courts of the States, the distinction of *patent* and *close* is unnecessary, and not used. The writ to the lord may include several tenements, held by several tenants, whereof the plt. is deforced; but when he issues process he severs them, and then is demanded of each the land he holds, as in the writ of right *close*; still if joined in either, there may be a joint verdict, and judgment against them, if they do not plead in abatement. And non-tenure, joint tenancy, sole tenancy, and several tenancy, are good pleas in abatement. And so is the law in the United States as to pleading, strictly considered. But so situated are many of our new lands, and the intruders on them, that it would be ruinous in actions brought to recover them, to countenance the strict rules of pleading, applicable to old

Booth, 28,  
31—1 Com.  
D. F 12,  
Abatement.  
—Lutw. 11.

countries, and land fenced and cultivated, as will be shewn presently, somewhat at large, in stating a few such American cases. See Ch. 176, a. 12, s. 1 to 28, Non-tenure &c. The disability of one plt. in this writ abates it. See Ch. 176, a 4, s. 9.

CH. 228.  
Art. 3.

§ 12. *Proceedings in the writ of right how reformed in the United States.* The proceedings in this writ in England are very various and prolix : various, because there are several kinds of them tried in courts differently constituted ; as in that country there is a right *patent*, a commission to the lord of the manor to proceed in it in his court ; a writ of right *close*, issued out of the courts at Westminster, directed to the sheriff, and triable in the law courts there ; the writ of right of London &c : prolix, because so many steps must be taken in carrying one through to execution, and getting possession, that often it is years before the suit is finished. 3 Bl. Com. 193 to 197, and Appendix. And therein may be wager of battle. See Bracton, who wrote before these proceedings were reformed by English statutes ; Fitzhebert's *Natura Brevium* ; the Register of Writs ; also Reeves' History of the Common Law ; Comyns' Digest ; Coke on Littleton ; Coke's Reports and Entries ; Rastell's Entries ; Booth on Real Actions. And as to the more modern proceedings in this writ in particular cases in England, see 3 Wils. 419, 541 ; 5 East, 272 ; 2 B. & P. 384 ; 1 H. Bl. 1.

§ 13. In the United States, especially in Massachusetts, Maine, &c. the proceedings in this writ, are as expeditious as in other land actions in which the inheritance is demanded. There is but one kind of writ of right in the United States, which is in all cases issued from a court of law, usually the lower court in the county in which the land demanded lies, or the Federal Circuit Court ; and it is issued in the common summons form, directed to the sheriff, or other proper officer, by him served on the tenants named in it, and returned by him to such court issuing it, as other writs are ; and all this may be done in fifteen days, and the action may be entered the first day of the court's sitting, and the tenants called. The court proceeds in it generally as in other land actions, brought for recovering the inheritance. Pleas in abatement, aid-prayer, oyers, and vouchers are the same. So pleading in bar any special matter, as a former judgment in a writ of right &c., as a. 3. s. 1. A common jury tries the issue, whether the proper one, the *mise joined*, or not guilty, be pleaded. A view by the jury of the estate demanded, a new trial, and review, are as in other land actions. The matters in pleading almost peculiar on the writ of right are, 1. The demandant, in grounding his action on his own title,

CH. 228.

Art. 4.



alleges the actual seizin he means to prove, as essential to support his action, to be a seizin of right, as before stated : 2. He accurately traces from this seizin his title to himself ; this he does in some other land actions, though not in writs of entry, as already shewn : 3. He alleges a forfeiture, and not a disseizin ; this he also does in some other such actions, as seen in our precedents : 4. He demands the lands &c. as his right and inheritance : 5. The *mise* joined, the verdict, and judgment conforming to it, as before stated, altogether peculiar to the writ of right, are the seizin of right, *mise* joined, verdict, and judgment.

§ 14. *Evidence on the mise joined.* As on this writ only the mere right of property is tried, and no regard is had to the right of possession, and every matter is in evidence except collateral warranty ; evidence is considered and admitted on very liberal principles. This evidence of course includes the titles of the parties to the property in question, of every sort, except such a warranty the tenant may have. These liberal principles appear in *Tyssen v. Clark*, and other English cases ; and will appear presently in the American cases, to be carried very far.

§ 15. The American reforms, or improved proceedings in this writ, are the result of a very similar organization of the courts of law throughout the Union, and of many statutes enacted generally to regulate our judicial proceedings ; which exclude various kinds of process used in the English proceedings on this writ, numerous parts of very dilatory proceedings, which yet, by law, include also the absurd trial by wager of battle, if the tenant insist on it. Some few statutes relate particularly to this writ in the United States ; as one in Virginia for "reforming the method of proceedings in writs of right," passed in the year 1786, which changed the mode of trial ; also an act passed December 19, 1792, declaring that "actual possession need not be proved to maintain a writ of right ;" and the act of 1786, allows the tenant to give in evidence, at the trial, on the general issue, any matter which might have been pleaded specially. Construed by the Supreme Court of the United States to be in bar only. 8 Cranch, 243.

#### ART. 4. *Writ of right in America.*

§ 1. Already several matters have been stated in relation to this writ of right in use in most, if not in all our States, in connexion with other matters ; as in *Adams v. Frothingham*, Ch. 68, a. 4, s. 5, and a. 7, s. 3, brought to recover flats ground, and in which the *mise* was joined. Ch. 178, a. 14, how formerly confounded with ejectment &c. in Massachusetts. Ch. 178, a. 21, s. 9, 10, &c. where it lies, and material points

in it, issue on the *mise* joined, &c. in pleading title and seizin. Ch. 228.  
 Ch. 104, a. 3, s. 34, *Green v. Liter*, as to seizin in it &c., Art. 4.  
 and several points in Ch. 104, a. 3, s. 36, *Leonard v. Leonard*. Seizin essential in this writ, head Seizin and Disseizin.  
 Ch. 183, a. 5, s. 12, *Tissen or Tyssen v. Clark*, as to a new trial in a writ of right. Declarations in writs of right, Amer. Preced. 303, 304.

§ 2. Writ of right, dated March 1805. Plea of land wherein C. & al. demanded against P., as the right and inheritance in fee simple of the said C. & al., one undivided sixth part of a certain tract of land lying &c., containing thirty-six square miles bounded &c., with the buildings thereon and appurtenances to the same belonging; whereupon the demandants say, that Edmund Currier, late of &c., father of the said — (demandants,) in a time of peace, within sixty years last past, was seized of the demanded premises in his demesne as of fee and right, taking the issues thereof to the value of \$50 a year; and at — on — said Edmund died so seized of the demanded premises, and from him the right of the demanded premises descended to the said Abraham, eldest son of said Edmund, and to said Isaac, &c. (demandants,) the children and heirs of the said Edmund, to wit, (stating the proportion of each plt.) as the children and heirs of the said Edmund according to law, and they thereupon became seized of the right in the proportions aforesaid accordingly, and ought now to be in possession of the demanded premises; yet the said Parsons hath within the time aforesaid entered into, and still unjustly withholds the tenements aforesaid, with their appurtenances, from the demandants. In this action there was a trial in the common pleas, and as to a tract of about one hundred and sixty acres, one about twenty, and one about two hundred and seventy acres, each tract particularly bounded in the pleadings. Deft. said he was not guilty, and issue joined; and as to the residue disclaimed, and as to this disclaimer the demandants demurred. Verdict &c. and Parsons appealed. May term 1807, these pleas were pleaded in the Supreme Judicial Court, but in this court the demandants confessed the disclaimer. C. J. Parsons suggested, that the plea of not guilty was improper in a writ of right, and bad on special demurrer; then the usual pleas in a writ of right were pleaded as to the three tracts defended, and disclaimer as to the residue, as above. These pleas were waived by consent, and the plea of not guilty restored. After pleading, the writ and declaration were found to be defective and were amended; then the tenant offered a plea of *non-tenure* in abatement, because he was only tenant at will to Edward Lyde and wife &c., and on the ground the writ of right must be against the

Abraham  
 Currier & al.  
 v. Parsons,  
 May Term,  
 1808, County  
 of York,  
 Maine.  
 Coxhull  
 cause.

Cas 229.

Art. 4.



tenant of the freehold. Rather than meet this plea in abatement the demandants agreed (May term 1807,) to admit Edward Lyde and Elizabeth, his wife, Thomas Hutchinson, Elisha Hutchinson, Daniel Oliver, B. S. Oliver, and W. S. Oliver, also defts. ; they had the Sanford title under the Phillips' title. So the defts. by consent used this title and seizin. Plea of non-tenure, because the deft. was but tenant at will to E. L. &c. deemed good ; and 3 F. N. B., must be against tenant of the freehold at least. May term 1808, the parties went to trial on the general issue of not guilty, by consent, on a variety of Indian and other deeds, patents, wills, evidence of seizin, disseizins, fluctuating possessions, &c. where Indian wars were frequent, beginning with an Indian deed, dated Feb. 19, 1660. In this case it was ascertained that a will of lands was valid in Massachusetts made June, 13, 1670, though attested but by two witnesses, acknowledged as a deed and registered as one, and not proved in any probate court ;—was before the statute of frauds. 2 Bl. Com. 378 ; 1 Mod. 117 ; Cro. Car. 165, 397 ; Cro. El. 100 ; 3 Com. D. 359. Another point was settled, that is, that "livery in law passed the fee in land, without any deed," in the province of Maine till 1677. Co. L. 48, &c. : 3. An Indian deed or writing was viewed only as a description of the land upon which the grantee might enter and gain seizin, and not as giving title to the soil : 4. A will of lands made February 1682, lying in Maine was valid, though attested by but two witnesses, and proved in Boston before the governor and two assistants ; then the law required but two witnesses, and any two magistrates with the county recorder, or clerk, could prove a will in Massachusetts ; 2 Mass. Laws, p. 967 : 5. A will made in Rhode Island, including lands in Maine, February 1701, and proved in council in Rhode Island, and in 1771 was recorded in the probate office in the county of York, was not allowed evidence, though the original was offered, because only proved in another colony, and because then there was no law for recording such a will in Massachusetts : 6. A survey actually made in 1720, of lands, including those in dispute by a surveyor appointed by the grantors of the admitted defts. sworn to by him in 1722, and recorded, he also swearing he erected tents on the lands surveyed and lodged therein, and cut and marked trees in order to acquire possession for his employers, was, though objected to, admitted as evidence ; they then made claim to said lands so surveyed ; the surveyor died many years before the trial : 7. In partition by court proceedings Governor Hutchinson, as tenant by the curtesy, joined in the petition, A. D. 1767, and also in behalf of the children of his late wife deceased, and with the tenant by the

courtesy those in reversion were joined ; in this partition assigning to the petitioners in severalty 3,650 acres, all the proceedings were regular and produced at the trial, except the petition and notice, and these the court presumed existed at the time, considering the petition had been made near forty years before the trial : 8. Held, on the principles of *Cook v. Allen*, this partition and assignment of lands to the petitioners on notice publicly given, gave the right of possession to them, not to be disturbed but in a writ of right on the mere right of property ; and none but those to whom said 3,650 acres were so assigned could have a right of entry or claim any seizin ; the 3,650 included the one hundred and sixty and twenty acres defended ; but the question was not made if the petitioners had a right of entry when they petitioned for partition : 9. Though this thus gave them possession it did not disable another to enter who had a right of entry when the partition was made : 10. In this trial in several instances, seizin and possession between 1660 and 1694, depended on the ancient practice of livery of seizin, actually made on the land by turf and twig before witnesses : 11. Several of the deeds and papers in this cause shew that a considerable part of the title the demandants claimed was not in them, but in third persons, especially as to the proportion they claimed. The most material question in this action was, if the deft. should be allowed to reduce the demandant's proportions &c. by shewing that third persons, or strangers to the action, had the right of property in whole or in part, and that, therefore, the demandants had not ; and for one reason among others, many pieces of evidence were admitted in the trial, tending to prove the right of the property demanded was in such third persons, and not in the demandants. The arguments were, that the demandants in this writ of right claim the mere right of property only, and admit the deft. has the right of possession, as well as the actual possession. This right of possession and actual possession make a good title in all real actions, except in the writ of right, which rests solely on the mere right of property. Hence, it is very reasonable the tenant in defence of his actual and rightful possession be allowed to shew and more reasonably to argue on evidence already in the case, the demandants have not the mere right of property, but that a third person has it, or that the demandant's title to it is expired. Hence the demandants must state and prove the right that comes to them. So the same is true when the demandants claim more than they have a right to ; for as to the surplus they have no right at all. For instance, A dies and his lands descend equally to his five sons ; one after many years brings his writ of right for the whole, and

CH. 228.

Art. 4.

See post.

Ch. 228.

Art. 4.



proves he is a son of A, he will recover the whole, and four fifths without any title whatever, and turn out the tenant having actual and rightful possession, unless he be allowed to prove A left five sons, his heirs &c. Nor is this matter in abatement, for one may sue alone, and declare for a larger and recover a small proportion; and if by any evidence already in the case the five sons and heirs appear, the tenant's argument seems almost of course to reduce the demandant to his one fifth.

Also urged, that there were no authorities for the demandants' recovering the four fifths in such case. Further, the demandants must come prepared to shew they have the mere right of property in the land they demand. Also, there is a material difference between a writ of right and a writ *sur disseizin*. In a writ of right the demandant must not only shew he or his ancestor was seized in fee, but also in right, having with his seizin the very right of property; but in an action *sur disseizin* he need only prove his seizin. A third principle in a writ of right is, (after stating and proving actual seizin and in right, and that the mere right of property came to the demandant,) that the tenant has a better right to hold than the demandant has to recover. This is the issue, and it applies to each part of the demanded premises, as well as to the whole. Many of the authorities quoted in this chapter to the purpose of title in a third person were cited.

3 Wilson,  
541 to 564.  
A. D. 1771,  
Tyssen v.  
Clark.—See  
a. 3, s. 8.

§ 3. In this case, *Tyssen v. Clark*, which was a writ of right on the seizin of the demandant's father within sixty years, the *mise* was joined; the tenant opened and shewed that March 28, 1706, the demandant's grandfather was seized in fee and granted to one Flanders in fee, as the tenant urged. This fee in Flanders, a third person, was the only material point in the action to defeat the demandant, and to shew his father was not seized in fee and right within sixty years. And though the tenant was allowed to make this point, he shewed no privity or connexion between himself and Flanders, the third person; for the tenant began his own title with a mortgage in fee in 1736, to his father, from Roger Osbaldeston, and shewed no connexion between him and Flanders; for though his widow administered on his estate, and made Osbaldeston her executor, yet this constituted no privity between him and Flanders, in regard to the inheritance. The main question was, if the setting out lands to Flanders was in fee simple, or for forty-one years. On either side there was only presumptive evidence. As the tenant's evidence of a fee was only presumptive, the court, on argument, allowed the demandant to produce presumptive evidence on his side of a leasehold for forty-one years; and mere draughts of leases

from the lord to Flanders, were allowed to go in evidence to the jury, written for forty-one years, but not executed; and so other evidence, in itself light, to enable the jury to presume that Flanders took a fee simple, or that he took a lease for years, as the whole evidence might be. The court said, the cause was to be decided on the mere right, without regarding seizin; and the jury was left to presume a grant in fee to a third person sixty-six years before the action, from circumstances or not, or a lease for forty-one years.

CH. 228.

Art. 4.

§ 4. There was the like ground of presumption in this case of England v. Slade. "Jury may presume a surrender or conveyance in much less than twenty years." See Doe v. Prosser, above, ouster presumed. Same on twenty-six years' possession. 5 Burr. 2604, Fairclaim v. Shakleton; Ch. 92, a. 1, s. 6. Grant of a way presumed after twenty years' quiet enjoyment. 3 East, 294, Campbell v. Wilson; and Ch. 79, a. 3, s. 16. So a market. 1 Bos. & P. 400, Holcroft v. Heal; and Ch. 45, a. 1, s. 6, a. 2, s. 16. So a deed presumed after fifty years, and an ouster after forty-two years. New York T. R. 84. And see Presumption, Ch. 94.

4 D. & E.  
663, 664,  
England v.  
Slade.—Ran-  
nington, 342.

§ 5. "If the deft. prove a title out of the lessor, it is sufficient, though he have no title himself." 1 Dallas, 18; and s. 15, post.

Bul. N. P.  
110.

§ 6. So in replevin the deft. is allowed in his defence of his possession, to shew the property is in a third person, a stranger to the action, and not in the plt. in bar of his action. And Brown v. Turell, Story's Pleadings, 380; and Ch. 82, a. 3, s. 6; Ch. 171, a. 11, s. 1. There can be no doubt but that the tenant has a right to shew a title in a third person thus on evidence admitted in the trial, showing such title. The difficulty is in admitting the tenant himself to introduce such evidence, as will be seen in other cases. Perhaps, on the whole, the following distinction, made by an able judge, is the true one. He says, "as to giving the title of third persons in evidence in writs of right, I take the distinction to be this: that title in a mere stranger cannot be given in evidence in such an action, if it may legally consist with the seizin of the demandant. But to disprove the seizin of the demandant, such a title may be given in evidence; for whatsoever shews that he had no seizin within sixty years, or the period fixed by the statute of limitations, is proper evidence to rebut his suit. If the demandant has conveyed more than sixty years ago to a stranger, it may conclusively shew, that he has not within that period had a seizin. So of his ancestor. But if the demandant has had a legal seizin within sixty years, a mere dormant title in a third person does not destroy that seizin; and that seizin entitles him to recover, unless the

6 Mod. 81.  
126, 149.



CH. 228.

Art. 4.



See these formalities stated in Booth; also 2 Saund. 46. —3 Wils. 419, 541, 558.— 2 Bos. & P. 384.

tenant shews a better title. In short, the trial in a writ of right is not in a comparison of titles at large against all the world, but a comparison of the title of the demandant with the title of the tenant." This doctrine is perfectly consistent with *Tyssen v. Clark*, 3 Wils. R.; and *Green v. Lister*, 8 Cranch. In *Tyssen v. Clark*, if the grant in fee to Flanders had been proved, it would have proved no seizin in the demandant's ancestor within sixty years.

§ 7. Other cases of writs of right will shew also we have but little regard to many of the forms adopted in practice in England, in this highest species of land actions; that we have no regard to the distinction there between the writ of right *patent*, and writ of right *close*; that we have no special jury of sixteen, but only a common one to try the right; that we do often try it on the plea of not guilty. In fact, we agree with the peculiarities of the English proceedings in a writ of right, in nothing but, 1. In trying the mere right of property only: 2. In a liberal admission of evidence: perhaps, 3. In allowing the deft. in defence of his actual and rightful possession, to defeat the demandant, (when the case is so,) by shewing the mere right of property is not in him, but in a third person; at any rate, the seizin for the legal time is in him: 4. In making the decision in this species of action final, as the highest kind of real action. In *Tyssen v. Clark*, the deft. opened and closed. But in *Adams v. Frothingham*, the demandant opened and closed. And *Dowland v. Slade & ux.* 5 East, 272, the court seemed to take the rule to be for "the tenant, generally speaking, to begin, and to shew that he has more mere right than the demandant." And Sergeant Williams says, "the tenant first begins his case, because the *mise* is first prayed for, and joined by him." 2 Saund. 45 f. We have no tender of a demy-mark in form or substance. "In English practice only a collateral point is tried by a common jury."

2 Wheat. R. 306, 316, *Liter & al. v. Green*.—See *Green v. Lister*, Ch. 104, a. 3, s. 34, and this chapter, a. 3, s. 2, a. 3. s. 8.

§ 8. The demandant may recover against several defts. holding in severalty, if they do not plead in abatement in a writ of right. As if the demandant bring his writ of right to recover a tract of land by metes and bounds, and declares against the tenants jointly, where, in fact, each holds his part in severalty, they may plead this matter in abatement; but if they do not so plead, but plead in bar, they admit their joint seizin, and omit their opportunity to plead several tenancy: 2. The *mise* joined is the proper issue in a writ of right and in bar; and the tenants can plead no other plea in bar, for upon the *mise* joined every matter relating to the mere right of property is in evidence; and to deny the actual seizin or possession of the demandant, or of his ancestor, or of any one

CH. 228.

Art. 4.



under whom the demandant claims the demanded premises, or any part thereof, in a plea, is pleading a plea which amounts to the general issue : and 3. To allow such a plea, or not, is matter in the discretion of the court in which pleaded, and is not therefore a subject of error : 4. If to such a count the tenants demur, their demurrer must be overruled, as their several tenancy is but in abatement : 5. On the same principle the court will not compel the plt. to count against them severally, as to their separate and distinct tenements : 6. The court below allowed the tenants to sever in pleading, and to plead the *mise* severally, as to several tenements held by them, parts of the demanded premises, not pleading any matter as to the residue. (Not assigned for error by the demandant, "and the error, if any, is in favour of the tenants.") The demandant replied to the several pleas, and the cause was tried on the *mise* joined on each plea &c. Jury was discharged. At a subsequent term the court below refused to permit the tenants to withdraw the *mise* thus joined severally, and to plead non-tenure as to some, and several tenancy as to others, in abatement. This refusal held to be correct, for they had passed their time to plead in abatement. Verdict, "the jury find that the demandant hath more mere right to hold the tenement as he hath demanded than the tenants, or either of them have to hold the respective tenements set forth in their respective pleas, they being parcels of the tenements in the count mentioned." Verdict is good, being certain to a common intent : 7. Joint judgments against the defts. for costs, as well as land, correct : but, 8. They were not allowed to prove title in third persons to 2000 acres, parcel of the land demanded, they having no privity with the tenants. One reason, the 2000 acres, or any part thereof, did not appear to be within the boundaries of the land claimed by any of the tenants, or put in issue. So this last point, on the whole, is not against the principle above stated. But in *Green v. Liter & al.*, Ch. 104, a. 3. s. 34, it is said, a plt. can no more support an action against several defts., having distinct seizins and titles, than he can against several defts. on several distinct contracts. This may be generally true ; there is, however, a difference. In *Liter v. Green*, above, it is admitted, that if the plea in abatement of several tenancy be not seasonably pleaded, the cause may proceed ; and there may be a regular verdict, and judgment against several tenants, in fact, having distinct seizins and titles ; and so have been many verdicts and judgments in Maine ;—and one bill of costs against all the tenants jointly. And the reason is, these several distinct seizins and titles to several parcels of land held by the tenants in severalty, even by the most visible

See s. 6, this art.

Ch. 228.

Art. 4.



metes and bounds, can never appear on the record, unless timely pleaded in abatement, though they will appear in the trial and evidence. But if the plt. sue several distinct contracts, against several defts., as the distinct contracts of each in one action, clearly he never can have such a regular verdict and judgment against them, as the verdict must find, and the judgment must be on each contract; no joint plea could aid in such a case. Indeed, on the several distinct contracts of several persons, as the four separate notes of A, B, C, and D, one joint action, verdict, or judgment is impossible, upon any form of pleading whatever. In fact, the distinction is material.

§ 9. But the material inquiry in our practice is, how far intruders on the demandant's new lands can oblige him to sue them severally, in as many actions as there are trespassers on his one entire tract of land, by any manner of pleading whatever, in any form of action to recover his land. On a general principle there seems to be no doubt, (as Ch. 176, a. 12,) but that the non-tenure, joint tenancy, sole tenancy, and several tenancy, may be pleaded in any land actions, which lie only against the tenant of the freehold, and generally in abatement; though not always considered in abatement. So where several intruders hold the demandant's land in severalty, and their several possessions are well distinguished by fences and other visible boundaries, and their several titles by deeds recorded, as usual in old settled countries, it may not be so extremely unreasonable to oblige the owner to be at the trouble and expenses of fifty several actions against fifty several intruders, trespassers, or disseizors, on his land, where their several metes and bounds can be by him conveniently known; and their respective possessions conveniently described by him in his various declarations and actions. Even in this case these intruders illegally disseize the owner of his land, and against his will, and therefore are entitled to no favours in their pleadings. But if a plt. take several distinct contracts from several persons, the act is his own, and he has not a word to say if he must sue as many actions as he has seen fit to take contracts of disconnected persons.

§ 10. With regard to intruders on new or wild lands of another, the pleas of several tenancy made in abatement by them, have ever been discountenanced, and rarely, if ever, suffered in our practice, for reasons stated Ch. 112, a. 5, s. 2, 6, &c. *Varnum v. Fox*; and Ch. 134, a. 3, s. 31; and especially when the demandant does not ground his action on their disseizins, but on his own title. In the note on *Varnum v. Fox*, a just distinction was made between the demandant's action grounded on his own title, and his action grounded on

the tenants' disseizins. Now in a writ of right the demandant grounds his action entirely on his own right, and he does not even allege disseizins made by the tenants; he merely states his own right and title, and alleges they desforce him, that is, exclude him from his land; and he does not even bring into view their several disseizins; and what distinct titles have mere intruders, or disseizors, claiming adversely to the true owner? The several tenancies and tenants sued in one writ, being pleadable only in abatement, as is well settled, shews that joining them so, is but a mere defect in form;—and it may be added, that in our suits in which such tenancies and tenants have been joined in one action, the plea in abatement has not been pleaded. Hence the proceedings have been regular even on the principles of *Liter & al. v. Green*.

§ 11. *The manner of suing many defts, in one action*,—practised in Massachusetts till 1804. As where Coffin & al. sued Hodge, Prince, Cheney, A. Andrews, and S. Andrews, in a plea of land, and demanded 2000 acres bounded &c.; and alleged that one Charles Coffin in 1743, was seized in his demesne as of fee &c.; and October 30, 1748, died seized of the right, leaving the demandants, his children and heirs, stating the share and proportion of each; that on ———, the defts. illegally entered &c., and disseized the said Charles; that the right descended to the demandants;—so in common form. In 1759, these 2000 acres, with a large tract of land, were surveyed, and generally divided into 100 acre lots, each a several and distinct lot, the defts. severally became possessed of their several separate lots, each holding and claiming his lot as his own in fee and severalty. In the lower court the defts. pleaded severally not guilty, with reservations. In 1794, the plts. carried the cause to the Supreme Judicial Court, in which each deft. described in his plea, his several lot he claimed and defended, and as to that said he was not guilty, (and issue,) and he disclaimed all the residue of the demanded premises. (Disclaimer answered, *pro forma*.) In this way five issues were formed on five several pleas of not guilty, severally pleaded by the five defts. as to their five several distinct lots they held and claimed. These were all submitted to the jury together, and in the trial the demandants proved their title to the 2000 acres, and each deft. adduced his evidence to prove his title to his lot. Verdict on each issue, and judgment accordingly. Most of the evidence that applied to one lot, applied to each other. The plt's. evidence, which extended above a century and a half, and was voluminous,

as to the part he possessed, and not guilty as to the other parts possessed by the other defts. Judgment for the plt. against all the defts. severally, according to the verdict, and the jury also assessed damages, six cents, against each deft.—Many cases cited, see Ch. 178, a. 14, a. 13.

CH. 228.

Art. 4.



Coffin & al. v. Hodge & 4 others. Same as *Liter & al. v. Green*; by that case it seems the practice in Kentucky is to bring the action, as this of Coffin v. Hodge was brought for several tenements held in severalty.—5 Johns. R. 278, Jackson v. Woods. In New York five tenants were sued jointly in ejectment, who jointly entered into the consent rule, and pleaded jointly; they severally possessed the premises in separate parts, and the jury found each deft. separately guilty

CH. 228.  
Art. 4

applied at once to all the five lots and issues. So the surveys, plans, &c. on the the defts'. part, applied at once to all, and the trial of the five issues required but little more time than the trial of one would have done. Thus the right and title to five several and distinct lots were settled with but little more trouble and expense than the right and title to one lot alone would have been, had the manner of pleading, lately advocated, been adopted, and the defts. had pleaded in abatement their several tenancies, that had existed forty or fifty years, and driven the plts. to their five several actions; or had so many actions been brought in the first instance. These five lots the plts. recovered by judgment, and the residue of the 2000 acres they came into possession of as a matter of course, being fully disclaimed by the defts. These pleadings brought every matter in dispute between the parties, fairly before the court and jury. For a long period of time before 1804, hundreds of actions were brought and conducted in this manner, and not a plea in abatement ever mentioned. In another action of this kind there were nine defts. pleading in this manner as to their nine several distinct lots. In another action twelve such defts. &c. &c. In some of these actions some of the defts. prayed in aid, and some vouched to warranty, each conducted with simplicity, and according to the nature of the case. In many of these cases in fact, writs of right were brought, declaring on the seizin of some ancestor, in his demesne as of fee and right, taking the esplees &c. within sixty years &c. his dying seized of the right; that the right descended to his heirs, stating how heirs &c., and the deforcing of the tenants; but the *mise* was not joined; but not guilty was pleaded generally,—sometimes *nul disseizin*, and the demandant opened and closed.

Cook & ex.  
v. Griffin,  
April Term,  
1808.

§ 12. This was a writ of right sued out 1801, in which Cook and his wife, in her right, demanded against the deft. one undivided sixth part of about fourteen acres of land in Gloucester, and of the buildings thereon, and declared in the usual manner, and accurately traced the right to said sixth part to her.

The defts. disclaimed as to about five acres by metes and bounds, and vouched in Samuel Whittemore, Esq. a remote warrantor, to defend the residue. He being summoned in common form, appeared, and pleaded that Griffin was not guilty, and issue joined. A *mise* joined was not then thought of. The demandants opened and closed. The evidence in this case, as in Tyssen v. Clark, was liberally admitted, and the jury left to presume many matters, as 1. That probate commissioners, who made partition in 1732, were sworn, though it did not appear they were in the proceedings; for the court

CH. 228.

Art. 4.

said, as these were in a regular court, the presumption is, it proceeded regularly, especially after so long a time; and the jury may now presume the certificate of the oaths is lost: 2. The demandants, proving their ancestor lived on the land till he died in 1743, (fifty-eight years next before the date of their writ,) his title, in fee, then must be intended: 3. It appeared by their evidence, he was tenant by the curtesy, and survived his wife near forty years; their declaration was formed on the ground this curtesy never existed; held well, on objection made, and the court said the demandants need not state all the particulars of their title: 4. The demandants claiming under Sarah Young, and it being suggested by the deft. that she, by some deed lost, conveyed her estate to her husband, under whom the deft. and Whittemore claimed, the court allowed both parties to read to the jury deeds made in 1740 and 1743, under which neither claimed; that from facts expressed in them, the jury might presume she did or did not so convey: 5. Said husband, and afterwards tenant by the curtesy, while such, by mortgage in fee to James Pitts, and then by a release of his equity of redemption, in fact, conveyed his wife's estate in fee; this was urged by Parsons as a forfeiture of his life estate, and said it had been so adjudged in Middlesex, so her heirs had a right of entry at the time of the release; but of such forfeiture the court took no notice: 6. Pitts conveyed to said Whittemore, but without warranty; he to Goss with warranty, whereon Griffin vouched Whittemore; Goss died about 1764, and left a widow and son; before 1770 he died, leaving her his heir; in 1770, she by deed conveyed to the deft., and in it stated she did it as executrix to her said son; and by license of court to sell; and added the usual covenants of seizin, warranty, &c. in her own right; the court licensed her, as administratrix, to sell. No evidence, except this order of court;—no evidence of any advertisements, nor of a vendue; held, she did not make this deed in her own right as to the conveying part, nor as executrix, but as administratrix, under the order of court;—and this, from all the facts, might be presumed to be the intention: 7. So after a lapse of thirty years, the vendue, advertisements, &c. might be presumed, where possession had gone quietly with the deed.

§ 13. These few cases are sufficient to show that our proceedings on writs of right, in Massachusetts and Maine, are very plain; and attended with scarcely any of those numerous and useless formalities adopted in English practice. Our writ of right is in common form, prescribed by statute;—our declaration is wholly peculiar, but in stating the right, and in not alleging any disseizins;—our writ of right is served, the

CH. 228. appearances, nonsuits, defaults, discontinuances, vouchers, aid-prayers, are as in other real actions generally, and so are the pleas commonly, except of late years we sometimes join the *mise*, but when we do, this is always tried by a common jury; the verdict conforms to the issue, and so does the judgment; costs and execution as in common cases.

Art. 4.

§ 14. As to judicial proceedings against many men, separately intruding upon, and separately possessing themselves of lots of the land of the same man, or of the same heirs, or of the same company or corporation, creating as many actions as there are distinct lots or possessions, on the principles of English pleadings, especially admitting the pleas of several tenancies, nothing can be more simple and plain, more expeditious and less expensive, than our manner of proceeding, stated above, in *Coffin v. Hodge & al.*, and in other like cases. Though I have in this work paid much attention to ancient English pleading in real or land actions, out of respect to the opinions of many eminent lawyers and judges in our country, I am by no means satisfied we are gaining any benefits, by our going back, of late years, to those pleadings. The very system they were fitted to, has long since passed away, and we now discern it, and can discern it, but in a very imperfect manner. We may say of many parts of it, as Lord Mansfield said of feudal seizin and disseizin,—we use the words, but little know what their feudal and ancient meaning was. There is a further consideration; the ancient English forms and pleadings in real actions, gradually came into existence, when rights and titles to lands depended almost entirely on visible and actual possession, attested and proved by the mere eye-sight of the vicinity. People in general were ignorant and illiterate as to titles to lands proved by writings. The grades of real actions grew out of the grades of actual and visible possession, as being for a longer or shorter time. The very reverse of this is now the case in the United States. Our titles to lands are almost invariably proved by writings, as deeds, wills, decrees, and judgments, regularly recorded, and open to the inspection of all. Our statutes, for near two centuries, have been invariably framed with a view to make our pleadings and proceedings in land actions conform to this modern evidence of land titles.

A statute is the foundation, on which a tenant defends a part of the land he is sued for, and disclaims the residue; as he is advised he has title or not. Before such a statute existed, the deft., sued for more land than he possessed and claimed, was obliged to plead non-tenure as to the part he did not claim; and this his plea, being good as to this part, totally defeated the plt's. action at common law. The effect

Mass. Act,  
Feb. 17,  
1780, cited  
Ch. 176, a.  
12, s. 7.—  
Ch. 176, a.  
12, s. 14.

was obvious, the plt. was obliged to sue the deft. for just the same land he held and claimed, or be defeated by this plea. When it is considered how impracticable it often was for a plt. to ascertain exactly how much, and what land the deft. held and claimed, it is clear he often sued at his peril, and often met this plea of non-tenure; hence it was a plea of the first impression. But now, by reason of several statutes and change of system, this plea of non-tenure is scarcely ever pleaded, nor can it be now but to the whole the deft. is sued for, or in a special case that rarely happens; that is, when the deft. defends a part of what he is sued for, and denies he has the mere freehold estate in the rest, but yet has some other interest in it, so that he cannot disclaim all right and interest in such residue; for as far as he has no interest at all, he must disclaim, on a fair construction of the statute. If time would allow it, it might be shewn that modern statutes, change in practice, and the above radical change in the foundation of titles to lands, have nearly put at rest, in like manner, a vast proportion of ancient English pleas in real actions, found in the old English books of pleadings.

Still I hold these ancient English pleadings are highly valuable, but not as a whole. The old feudal building, of which they were a part, has been, piece by piece, taken down, or at any rate so changed, that this ancient structure is no longer to be seen in practice; but in ages there were worked into this old system, maxims of law and first principles, of immense value, and ever will be so. It is these we can select and use to vast advantage. Of this kind are the material points and techical expressions of writs of right, of entries, of formedon, of dower, of ejectments, &c.; and in formed pleadings to the merits above selected. And it may be added, that these pleadings in land actions, grew up in England in connexion with a mode of conveying lands, the very essence of which was livery of seizin; in the place of which there ever has been adopted in Federal America, a regular deed of conveyance, duly acknowledged and recorded. And further, these English pleadings also came into existence in England in connexion with many kinds of feudal and other tenures, not one of which ever existed in our country, if we except *socage tenure*, and even that never existed here in the English form and manner,—as here, in America, it never has been attended with the service of the plough or other service. We may further add, that when these pleadings were most extended, and most in use in England, *devises* of lands and real estates were scarcely known there; and the laws of descent there, never have been adopted here, but in a moderate degree. These and other radical differences between the two

CH. 228.

Art. 4.



CH. 228.

Art. 4.



countries, in regard to titles to lands, tenures, and the modes of conveying them, have, in the nature of things, produced a material difference in pleadings in land cases. Also local circumstances in Federal America have increased the difference. The highest court of law in the United States have said, and truly, that a statute of Virginia, called the Virginia land law, under which Kentucky was settled, has produced, in that State, a system of land titles and proceedings, *sui generis*, quite peculiar to Kentucky. So in our District, now State, of Maine, Indian wars, for near a century, and a numerous class of men, called *squatters*, long ago produced a course of proceedings, in land cases, quite peculiar to that part of the Union. Also these squatters, in numerous cases, made such pleadings as are stated above, in *Coffin v. Hodge*, absolutely necessary. For instance, an individual, or corporation, owned a tract of new land, and a considerable number of them intruded upon it, one erected his hut in this spot, another in that, a third in a third spot, a fourth in a fourth, and so on, each possessing and claiming some land in severalty; but often without any definite extent or bounds;—each holding his improved land in severalty, but pastured in the woods and mowed spots of meadow ground, often in common. In this state of things it was utterly impracticable for the owner to ascertain the squatter's bounds, or the extent or dimensions of his possession, or claim. This was usually the case where the owner had not previously divided his land into small lots, bounded by marked trees, or natural monuments; and often, when he had, his divisions were totally disregarded by these intruders. No way was left to proceed in an action by the owner, to recover his land, but to allow him to include in his action, his tract of land, or some portion of it, the bounds of which he knew, and could safely, by a plan, point out to the court and jury. In fact, very properly to allow him to ground his action on his own evidence and title, and not to drive him to pursue, in scores of actions, the loose secret boundaries, or no boundaries of these trespassers. In such a state of things, the principles of suing and pleading in *Coffin v. Hodge*, were the only true principles founded in the good sense of the case. They placed the demandant on the true ground, his own title, and drove each tenant to state in his plea in bar, exactly the piece of land he claimed and defended, and to disclaim, on record, all the residue demanded. This was perfectly reasonable, as each tenant did know, or was bound to know, the exact extent and limits of the tract he meant to defend. To have supported, in such cases, the pleas of several tenancies or possessions, in abatement, had been a serious evil; and thus to frame actions and pleadings to the facts and law of new

and important cases, is, and ever has been, according to the first principles in all good pleadings. As to the plt's. suing in one action two distinct bonds, made by two distinct and separate debtors, and getting judgment &c. this would be directly inconsistent with the obligee's own title, made two, and distinct, by his own act. He must declare on his two bonds, made by two disconnected debtors, then by no possibility can he have one judgment only. One judgment would be repugnant to his own rights of his own shewing; but not so when a plt. has one entire title, founded on a single deed of lands, and he includes in one suit all of them, and several tenants holding each a distinct parcel. This one suit is exactly in conformity to the plt's. one entire title; the governing principle on which he ought to have one judgment and record of his title, and not split into fractions by wrongdoers.

CH. 228.

Art. 4.

§ 15. *Writ of right*,—in which the demandants counted on the seizin of Francis Waldo within sixty years, and a descent from him to them. They traced their title down. Two important principles appear in this cause: 1. The tenant was allowed to prove said Waldo had parted with his title in his life-time, to one Wedderburn and others, third persons, strangers to this action, and under whom the tenant did not hold or claim: 2. The demandants were allowed to prove that said Waldo was disseized when he made his deeds, (July 1, 1771,) to Wedderburn and others, and so to shew that nothing passed by those deeds of Waldo. The tenant's father disseized Waldo in 1764, and he and his son, the tenant, had continued their seizin till ejected in this suit. The court also allowed the demandants to suggest that they sued for the benefit of said Wedderburn and others, and to recover to their use. No hint they purchased of Waldo a law suit. Probably it was understood that when they took their said deeds from him, they did not know of Kellock's disseizin. As to the first and second points, see *Wolcot v. Knight*, Ch. 178, a. 17, s. 6. As to the first point, see *Tyssen v. Clark*, and sundry cases above. If the court had excluded Waldo's deed to Wedderburn and others, (as has been sometimes done,) the judgment would have been the same.

14 Mass. R.  
200, 203,  
Knox & al. v.  
Kellock.

§ 16. The writ of right is not favoured in England, because its tendency is to disturb long possessions, which the courts are anxious to protect. See *Maidment v. Jukes & al.*, 5 Bos. & P. 429; *Charlwood v. Morgan*, 4 Bos. & P. 64; and *Baylis v. Manning*, Id. 233. In all these cases the court was extremely strict in refusing leave to the demandant to discontinue and to amend. *Green v. Watkins*. Plt. in a writ of right dies, the effect, see Ch. 137, a. 10, s. 4.

Ch. 228.

Art. 4

Taylor & al.  
v. Huston,  
3 Hen. & M.  
161.

Act of Virg.  
prescribes  
the form of  
the plea and  
replication in  
writs of right,  
enacted  
1786 1 Rev.  
Code, c. 27.

§ 17. This was a writ of right brought in the county court of R., and the demandants filed their count in the form prescribed by law; after a rule to plead continued &c., entry was, May term, 1796, "usual plea, and time to reply; July, joinder." The parties went to trial without further pleadings. Verdict and judgment for the deft. The plts, obtained a writ of *supersedeas* from the judge of the General Court, by which the record was carried to the District Court of Staunton, where the judgment of the County Court was affirmed. The plts. appealed to this the Supreme Court of Appeals, and in this held, that all the pleadings must be in writing, and at full length; hence the deft. having put in for plea only the words, "*usual plea*," there was no issue. Repleader ordered. By the county court law, Ed. 1794, c. 67, s. 34, in all cases where the title or bounds of land are drawn in question, the pleadings must be all in writing, and entered at large, with the judgment thereon, in certain books kept for that purpose. But the manner of pleading above must have been bad at common law.

Gleeson's  
heirs v. Scott  
& al. see Ch.  
228, a. 11, s.  
41.

§ 18. Gleeson's heirs v. Scott & al., 3 Hen. & M. 278. Issue was joined on the mere right in common form. The point decided was, that before the Virginia statute was enacted, for docking estates in tail, the tenant in tail could, by a deed of bargain and sale, convey a base fee, a defeasible estate, voidable not by himself, but only the issue. Hence when he had so sold to his own heir in fee, he could not sue out a writ of *ad quod damnum* to bar the entail, being no longer seized of an estate in tail, absolutely necessary to enable him to sue such a writ. By a colonial statute, edition A. D. 1769, no fine or recovery could be levied or suffered, whereby to defeat any estate tail, nor could it be defeated but by act of assembly, except an estate tail, not worth above £200 sterling. By the same act tenant in tail of such small estate could sue out of the secretary's office, a writ in the nature of an *ad quod damnum*, directed to the sheriff &c., to inquire by a jury, of its value; and on complying with the terms of the law, the tenant in tail might by such a deed, reciting the title and inquisition, and expressing a valuable consideration, *bonâ fide* paid, convey the land in fee simple to purchaser, and thus bar the issue in tail.

Turberville  
v. Long. 3  
Hen. & M.  
309, 310.

§ 19. Judgment in a writ of right of the District Court of F., confirmed on error brought. Held, 1. If the original writ be lost, the court, after verdict, will intend it was a good writ; though some of the subsequent process be erroneous: 2. Appearance and pleading to the action cures all errors in the process: 3. It is necessary to aver the cause of action arose within the court's jurisdiction, only where brought in

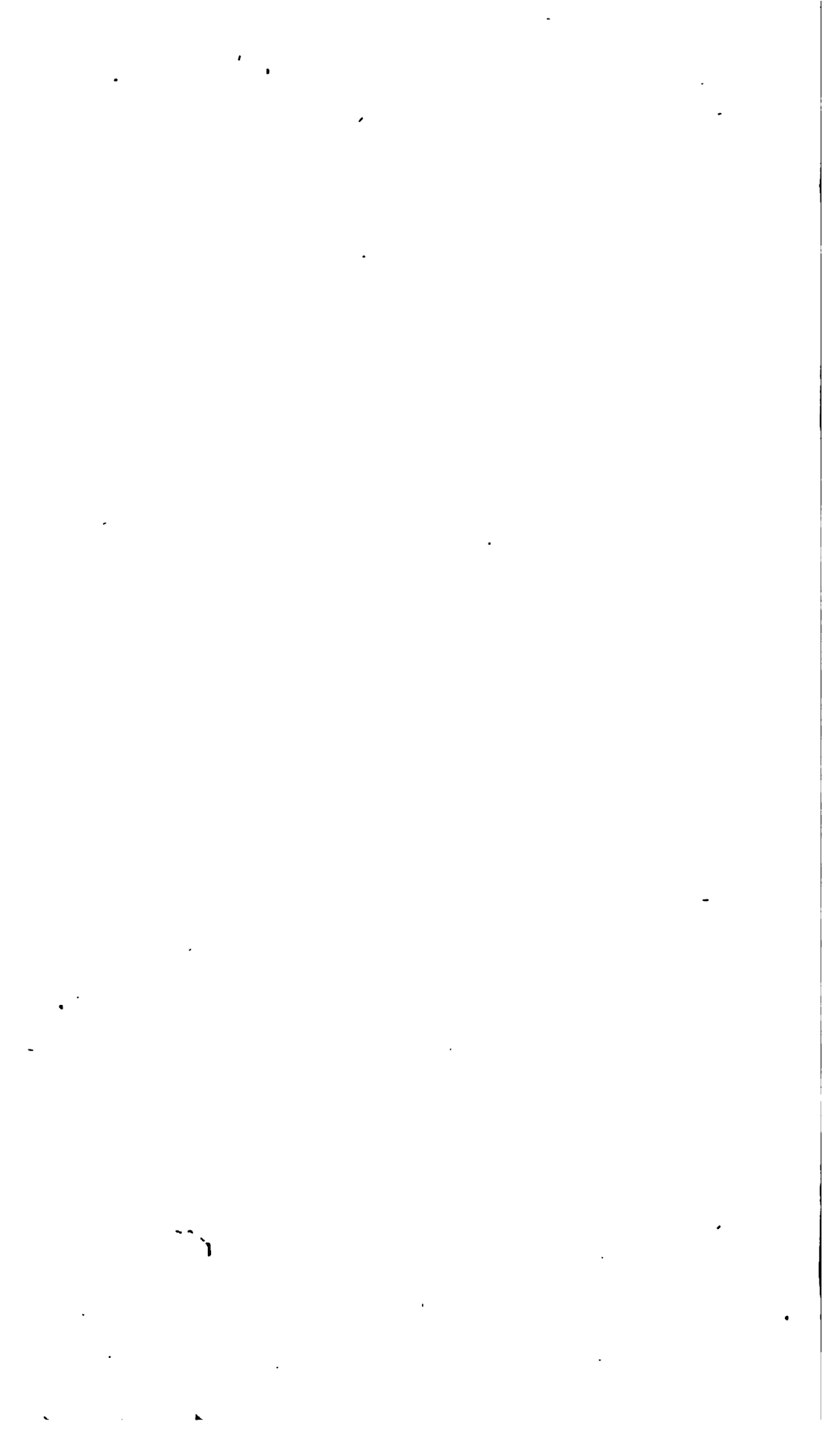
corporation courts : 4. A count in a writ of right, referring to boundaries, as in a survey made in a cause, is well enough : 5. When it is stated the plt. "replied" generally, after verdict, the court will intend a general replication was filed in writing : 6. The statutes of jeofails extend to writs of right ; hence if the verdict and judgment be substantially right, they will stand, though not in the words of the law. The tenant defended part, and as to part disclaimed the tenure and title. The verdict was, "we of the jury find that the demandant has more right to demand the land in the count and plea mentioned, than the tenant hath to hold." It seems to have been thought by the court, that all the above defects had been fatal on demurrer ;—or if legal objections on account of them had not been waived by the tenant's conduct. As to the word, *demand*, in the verdict, the court said, the demandant had more right to *have* the lands as he demandeth them ; on the ground verdicts are subject to the power of the court ; and relied on *Vandervier v. Pendleton*, 1 Wash. 381 ; and *Murray v. O'Neal*, 1 Call, 246.

CH. 228.

Art. 4.



END OF VOL. VII.













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